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REPORTS OF CASES
HEARD AND DECIDED IN THE
HOUSE OF LORDS
ON
APPEALS AND WRITS OF ERROR,

DURING THE SESSIONS

1833, 1834, AND 1835.

BY C. CLARK AND W. FINNELLY, ESQRS.,
BARRISTERS AT LAW.

EDITED,
WITH NOTES AND REFERENCES TO AMERICAN LAW,
AND SUBSEQUENT ENGLISH DECISIONS,

BY
J. C. PERKINS.

VOL. II

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MEMORANDA.

ON the 1st of April, 1834, the Right Honourable Thomas Denman, Lord Chief Justice of the Court of King's Bench, having been created a Peer by the style and title of Lord Denman, Baron Denman, of Dovedale, in the county of Derby, was introduced in the usual form. His Lordship was a few days afterwards appointed by his Majesty's Commission, and sat on several occasions during that session, as Speaker in the absence of the Lord Chancellor.

In Easter term, 1834, Sir William Horne resigned the office of Attorney-General, and was succeeded by Sir John Campbell, his Majesty's Solicitor-General; Charles Christopher Pepys, Esq., one of his Majesty's counsel, was appointed to the office of Solicitor-General, and received the honour of knighthood.

By royal warrant, dated the 25th of April, 1834, the Court of Common Pleas was opened to the whole bar. *Vide* note p. 487, *infra*.

On the 16th of September, 1834, the Right Honourable Sir John Leach, Master of the Rolls, died. In the following October, Sir Charles Christopher Pepys, his Majesty's Solicitor-General, was appointed to the office of Master of the Rolls, and Robert Monsey Rolfe, Esq., one of his Majesty's counsel, was some time after appointed to the office of Solicitor-General.

On Friday, the 21st of November, 1834, Lord Brougham and Vaux resigned the Great Seal, which was on the same day delivered to Lord Lyndhurst, who took the oaths and his seat in the Court of Chancery on the 22d, and continued to hold the office of Lord Chief Baron, together with that of Lord Chancellor, until the 23d of the following December.

On the 23d of December, 1834, Sir James Scarlett, Knt., one of his Majesty's counsel, was appointed Lord Chief Baron of the Court of Exchequer, and was shortly afterwards created a Peer by the style and title of Baron Abinger, of Abinger, in the county of Surrey.

About the same time Sir Edward Burtenshaw Sugden, Knt., one of his Majesty's counsel, was appointed Lord Chancellor of Ireland, on the resignation of Lord Plunkett; and Frederick Pollock, Esq., one of his Majesty's counsel, and William Webb Follett, Esq., were respectively appointed his Majesty's Attorney-General and Solicitor-General, on the resignations of Sir John Campbell, Knt., and Robert Monsey Rolfe, Esq., and they respectively received the honour of knighthood.

On the 23d of April, 1835, Lord Lyndhurst resigned the Great Seal, which was immediately put in commission, and Sir C. C. Pepys, Master of the Rolls, Sir L. Shadwell, Vice-Chancellor of England, and Sir J. B. Bosanquet, one of the Justices of the Court of Common Pleas, were appointed Lords Commissioners. At the same time Lord Plunkett was reappointed to the office of Lord Chancellor of Ireland, on the resignation of Sir E. B. Sugden; and Sir J. Campbell and R. M. Rolfe, Esq., were reappointed his Majesty's Attorney-General and Solicitor-General, on the resignations of Sir F. Pollock and Sir Wm. W. Follett, and R. M. Rolfe, Esq., then received the honour of knighthood.

In the early part of 1834, Francis Jeffery, Esq., resigned the office of Lord Advocate of Scotland, and was appointed a Judge of the Court of Session, and John Archibald Murray, Esq., was appointed to succeed him in the office of Lord Advocate. Mr. Murray resigned that office in December, 1834, and Sir W. Rae was appointed thereto; and on his resignation in April, 1835, Mr. Murray was reappointed.

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IN THE

HOUSE OF LORDS,

ON APPEALS AND WRITS OF ERROR.

APPEAL

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1833.

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| MICHAEL GILFILLAN, Writer in Glasgow . | . | <i>Appellant.</i> |
| ALEXANDER PIRIE HENDERSON, Writer in | } | <i>Respondent.</i> |
| Edinburgh | | |

Agreement. Attorney.

An agreement of partnership was made between two solicitors, one of whom could only practise in a superior, the other only in an inferior Court. Both undertook to divide the profits of their general business, and each stipulated to recommend the other to his clients, and to keep the partnership a secret from all the world. *Held*, that such an agreement is void, for a Court cannot suffer statements to be made and papers presented to it by parties who are neither parties to the cause, nor their lawfully authorized agents, and who are consequently not properly responsible to the Court for their conduct.¹

THIS was an appeal from the decision of the Court of Session, arising out of the following circumstances. Previous to the year 1817, the defender was residing * in Glasgow. The * 2 pursuer was at that time a partner in the firm of Bogle & Gilfillan, writers to the signet. In the year 1817 the defender

¹ See Collyer Partn. (5th Am. ed.) 70; Matter of Woodward, 4 John. 289.

came to Edinburgh, and got employed as clerk, and while there was occasionally employed in that capacity by the pursuer. The defender, soon after going to Edinburgh, resolved to commence business on his own account, and various letters were written by him to the pursuer, setting forth the defender's wish to be employed as the pursuer's agent, and stating the terms on which he was willing to undertake that office. In one of these letters he said: "If Mr. Gilfillan thinks it at all a practicable case, and one that he, from a confidence in me, I trust not misplaced, would feel inclined to go into, that a copartnership in the conduct of a general business can subsist between an Edinburgh agent and a Glasgow agent, I now offer him, in consideration of his employment, his considerable interest, and his advances towards the establishing and conducting the concern, which necessarily must be much more considerable than I have above pointed out, a third share of the free profits of my general business for a term of years. From my present views, the portion I offer to Mr. Gilfillan will not be inconsiderable, and must be extended by his own endeavours to procure me business; and I think the remaining two-thirds to myself, considering the trouble and responsibility of the undertaking, will not be considered too great. These separate proposals I make in the view of remaining in Edinburgh, which I confess is a wish most agreeable to myself." That the above was followed by a proposal of joining

the pursuer in his business in Glasgow, which was not acceded to; and then the * defender's proposals concluded thus: "In making these proposals, I beg Mr. Gilfillan will view them as intended for his private use; and trust in God he will conceal, if not destroy this paper, so as it does not catch the eye of any other person." An arrangement was accordingly entered into between the parties, to endure for five years after the 12th of November, 1818, but restrictable to two, by either party giving the other six months' notice. The agreement was to the following effect: "First, Mr. Gilfillan, from confidence in Mr. Henderson, agrees instantly to advance him the sum of 100*l.* sterling, to admit him an agent in the Supreme Court; which sum, with the legal interest thereof from the 12th day of November next, Mr. Henderson engages himself

to repay within two years from this date. Mr. Gilfillan farther engages to place at the disposal and command of Mr. Henderson, for the purpose of enabling him to conduct and carry on his business, the sum of 400*l.* sterling, according as the business shall require the same, without any right to demand interest therefor; and in case Mr. Gilfillan should be called upon by Mr. Henderson at any time to advance a large sum, he binds himself to pay him at the rate of two and a half per cent for such additional advance. These advances to subsist for five years, except in the restricted case after mentioned. Second, Mr. Gilfillan engages to promote the interest of Mr. Henderson, as much as shall not interfere with the free exercise of his own profession. Third, in return for these advances, and Mr. Gilfillan's influence, he shall be entitled, for the full period of five years from the 12th day of November next (restricted to two years in the event after mentioned), to retain from his own private, and from his client's accounts, one-third share of the * free profits of the same, as * 4 the same shall be pointed out by Mr. Henderson, Mr. Gilfillan regularly paying to Mr. Henderson his proportion, or the balances of said accounts, as the same shall, from time to time, be recovered; and Mr. Henderson separately engages, in return for the accommodation of advances, to pay to Mr. Gilfillan, during the above period of five years, but restrictable always to two, as after mentioned, one-third of the free realized profits of the whole other business conducted and performed by him. Fourth, in case the parties, or either of them, shall think it of importance to them to dissolve this agreement, then, after the expiry of two years from this date, and upon giving thereafter six months' notice, the one to the other, of their intention, this agreement will come to a close in the same way as if the whole five years above mentioned had elapsed; and in this case, as if the whole five years had expired, Mr. Gilfillan will be entitled to call, upon the concern being wound up, for repetition of his advances, and appropriation of any balance of his share of profits, in the same way as in common cases of copartnery, the parties suffering, in proportion to their respective shares, the possible loss occurring from bad debts, and the claims of either party in the concern shall be preferable to

any private debt. Fifth, this agreement shall be private betwixt the parties, Mr. Henderson throughout appearing the sole ostensible person, having full power to transact with clients or others, in such manner and on such terms and conditions as to him may seem expedient, without any control on Mr. Gilfillan's part, or his management, in one respect or another, except his private advice; and whether

any of his clients, in certain circumstances, ought not to receive reasonable indulgence, * as to charge and indulgence in payment. Sixth, in case of any dispute, legal proceedings upon one part or another are disclaimed, — the parties hereby agreeing to submit any difference to the Dean of the Faculty of Advocates for the time, — with power to him to call for the writ or oath of Mr. Henderson, in place of all other proof, as to the purity of his management, and correctness of his books, but the same shall be open for his inspection. Which books, Mr. Henderson, for the first two years, engages he shall keep free of all expenses to Mr. Gilfillan, but thereafter he shall be entitled to charge a reasonable proportion to the said Mr. Gilfillan's interest, for the keeping of the books and accounts. The accounts to be regularly rendered at least once each session. Lastly, for more effectually carrying these minutes into effect, the parties will be ready, in the course of the winter, to enter into a valid agreement, extended in regular form, and with such other additional clauses as may occur, to meet the true spirit of this agreement: if any serious loss or misconduct happen to take place to any of the parties, the arbiter shall be entitled to judge whether, in such event, this agreement should not be void and terminate. This agreement was immediately acted upon by both parties. Disputes afterwards arose between them, and the pursuer commenced his action, to recover a large balance, which he alleged to be due to him from the defender.

The defence was, that in fact this proposed contract had never been executed; and, further, that none of the stipulations it contained had ever been performed by the pursuer; and also (and on this point the case now came to be decided before the House of Lords), that, had any agreement been entered into between the pursuer and defender for the

division of * the professional profits of the latter, it would * 6 have been a *pactum illicitum*. Vide *Brashe v. Mackinnon*, Fac. Coll. March, 1820.

After hearing parties by counsel, Lord FULLERTON, Ordinary, pronounced the following interlocutor:—

“ 13th December, 1831. The Lord Ordinary, having heard parties’ procurators, and considered the closed record, finds that, by the agreement libelled, the pursuer, an agent in Glasgow, undertook to employ the defender, an agent in Edinburgh, in the business of his clients, and, in return, stipulated for a third part of the profits derived by the defender from that business: finds, that it was also part of the agreement that it should be kept secret: finds, that such an agreement was illegal, and therefore sustains the plea of *pactum illicitum*; assoilzies the defender from the conclusions of the action, and decerns: finds the defender entitled to expenses, and allows an account thereof to be given in, and to be taxed by the auditor.”

Against the interlocutor of the Lord Ordinary a reclaiming note was presented by the pursuer to the second division of the Court, upon which interlocutors were pronounced, adhering to that of the Lord Ordinary, and granting expenses to the defender. Against these interlocutors the present appeal was brought to this House; and the question for their Lordships’ decision was solely the legality or illegality of the agreement.

Dr. Lushington and *Mr. Busby* appeared for the appellant; and the Lord Advocate and the Solicitor-General for the respondent. After *Dr. Lushington* had replied,—

The Lord Chancellor moved the judgment: He * enter- * 7 tained no doubt whatever of the propriety and soundness of the decision of their Lordships in the Court below, and therefore he should not delay further the time of their Lordships in recommending them to affirm those judgments. As to the conduct of the party, Mr. Henderson, at whose instigation the arrangement was made, and who was undoubtedly as much a

party to the illegal arrangement as the appellant, in availing himself of that objection, that was a question with which their Lordships had nothing to do; he might have reasons for so doing, into which it was not their province to inquire. This was an observation applicable to all cases in which two parties were similarly circumstanced, and one of them set up the illegality of the transaction as a bar to a claim founded upon it. Their Lordships had nothing to do with that, nor was there any reason why they should express an opinion on the conduct of a party for availing himself of that illegality. The next point of importance for their consideration was, what was the law with respect to the conduct of a partnership between two persons, of the same profession, both of whom were qualified to carry on business in either of the Courts, and who conducted the business of that partnership openly before all the world, each following his professional duties at his own place of residence. That also was a question with which their Lordships had nothing to do. That was not the case here, where, first, one of the parties was disqualified from practising in the Court of Session, and the other in the lower Court; had they both been qualified to practise in both the Courts there might have been no objection to the contract, at least upon the nature of the contract

itself. But here there was an objection arising out of the * 8 mode * in which the parties proposed to conduct their business. It was one of the essential articles of this partnership, that its existence should be kept a secret from the world. These were circumstances, in his opinion, sufficient to set the contract aside, and to warrant him in saying that the Court below had most justly decided the question. It was impossible to say that the case was new. At all events there was the case of *Brashe v. Mackinnon*, (a) in which it appeared from the books that the Court was unanimous, and where it was "found to be illegal for an agent before the Court of Session to draw papers for a solicitor before an inferior Court, and to receive a proportion of the fees," upon the ground stated by the Lord Ordinary, that it was of the nature of a *pactum illicitum*; and the Court, upon advising a reclaiming petition for the

(a) Fac. Coll. 1820.

defender, were of opinion that such a practice was improper in both parties ; that it was improper for an agent in that Court to make profit of the proceedings before an inferior Court, and that it was improper in a solicitor before an inferior Court to enter into an arrangement, by which papers to be given into Court by him were to be drawn by others, though he was bound to certify that they were drawn by himself. Both these improprieties did not exist in the present case, but one of them did, and either of them was sufficient to avoid the agreement. If it was improper for an agent of a superior Court to make a profit of business done in an inferior Court where he could not practise, so it must be improper under similar circumstances for the agent of the inferior Court to make a profit of business in the superior Court ; the objection in both cases being that the Courts were called upon to exercise their functions * upon statements made and * 9 papers presented by persons who were neither the parties in the cases nor their lawfully authorized agents, and who were consequently not properly responsible to the Court for their conduct. On every finding, therefore, in the case of *Brashe v. Mackinnon*, he could see no difference between it and the present. This was a matter of Scotch practice, as had been most justly stated by the learned Solicitor-General ; and their Lordships would be very slow to go against the decision of the Court below on a point of practice, when coming here by way of appeal. The case of *Brashe v. Mackinnon* was not decided till 1820, but if it had not preceded this, he should have been very reluctant to entertain a different opinion on the subject. He should have proceeded on the ground that the parties could not enter legally into this contract, one of the parties not being qualified to practise in the Court from whence the emoluments arose. He was of opinion, therefore, that the contract was illegal between the two parties, standing in the relation they did towards each other. Part of the contract bound the parties to secrecy as against all the world, including their clients, each undertaking to advise his clients, who were in ignorance of the contract, to employ the other in causes in which the country solicitor had such an interest, as in this case he would have had, in the profits of the town

solicitor's practice. These things taken together were sufficient grounds in themselves to warrant him in humbly moving their Lordships to affirm the judgment of the Court below, with full costs.

Judgment affirmed with costs.

FROM THE COURT OF CHANCERY.

HARLAND AND OTHERS *v.* EMERSON AND OTHERS.

1834.

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| WILLIAM HARLAND, WILLIAM CHARLES HAR- | } <i>Appellants.</i> |
| LAND, and ORFEUR WILLIAM KILVINGTON | |
| JAMES LLOYD EMERSON, JANE LOUISA WAL- | } <i>Respondents.</i> ¹ |
| COT, and EDMUND GEORGE DENHAM . . . | |

Pleading.

To a bill filed by persons claiming title to an estate as co-heirs of A. T. *ex parte materna*, and charging an agreement and a correspondence in which they alleged their title was admitted, the defendants pleaded to the whole bill, that there was in existence an heir of A. T. *ex parte paterna*. *Held*, that the plea was properly overruled by the Courts below, on the ground that it ought to be accompanied by an answer as to the correspondence and some of the other charges in the bill.²

June 6, 9.

THE respondents, as the co-heirs *ex parte materna* of Anne Trigg, widow, who died in 1826, intestate and without issue, filed their bill in October, 1829, in the Court of Chancery, against the appellants, thereby praying, among other things, that it might be declared that the respondents, as the co-

¹ S. C. 8 Bligh, N. S. 62.

² See 1 Dan. Ch. Pr. (4th Am. ed.), 615, 619, *et seq.*

heirs of the said Anne Trigg, were entitled, in the several and respective shares therein mentioned, to the proportionate part of the yearly rent of 300*l.* therein mentioned, up to the day of the decease of the said Anne Trigg, and to one equal third part of the freehold and renewable leasehold estates devised by the wills of Richard Harland and Phillip Harland therein respectively mentioned, and of the rents and profits thereof respectively accrued due since the decease of * the said * 11 Anne Trigg, and for accounts and directions consequential on such declaration of right; and that a partition of the said estates and premises between the appellants and respondents, according to their respective interests, might be made under the decree of the said Court; and that the appellants might be restrained by injunction from setting up any outstanding term affecting the said hereditaments and premises, in any action or actions at law which the respondents might be advised to bring for establishing their title to the aforesaid one-third part of the said hereditaments and premises.

The bill recited the wills of Richard and Phillip Harland. By the former, bearing date July, 1747, the testator devised his estates, freehold and leasehold, in Yorkshire and elsewhere, to each of his four sons successively for life, with remainders to their first and other sons severally and successively in tail male, and for want of issue male of his said sons (an event which happened), then, "to all and every the daughter and daughters of all his said four sons, and their heirs, as tenants in common." That Phillip Harland, the eldest son, entered into possession of the estates so devised, upon his father's death, and by his will, dated in 1764, he devised some estates taken in exchange for the former, and others acquired by purchase, to trustees, to go with the estates devised by his father's said recited will; and he died in 1766, leaving two daughters, Elizabeth and Anne, his co-heiresses-at-law, and three brothers, him surviving. John Harland, his next brother, upon Phillip's death, entered into possession of the estates devised by both wills, and died in 1772, leaving Anne Harland, afterwards Anne Trigg, his only child, him surviving. The other two brothers, the remaining * sons of the first testator, died in 1784, un- * 12

married. Elizabeth Harland above mentioned, also died unmarried, leaving her sister Anne, then the wife of the Rev. Henry Goodricke, her surviving, to whom she devised all her freehold and other estates and interest for her life, remainder to Orfeur William Kilvington, one of the appellants.

The bill next stated, that upon the death of the last of the said tenants for life, the said Anne Harland or Trigg claimed to be entitled to the third share in all the devised estates and premises, and that, to end amicably some doubts respecting her title, she executed an agreement or lease of her third share in the said estates to the said Anne and Henry Goodricke, at a rent of 300*l.*, for a term of 99 years, terminable on her death, and that they then entered into possession of the receipts of the rents and profits of the said estates. The Rev. Henry Goodricke dying some time afterwards, Anne, his widow, intermarried with Charles Hoar, who took the name of Harland, and was knighted. The bill further stated the settlement made upon this marriage, and the wills respectively of Sir Charles Hoar or Harland, who died in 1803, and of Dame Harland, upon whose death without issue, on the 29th June, 1826, the appellants, William Harland, formerly William Hoar, and his son William Charles Harland, entered into possession of part of the said estates as devisees in the will of the said Dame Harland; and that Orfeur William Kilvington about the same time entered into possession of the remainder of the said estates, under and by virtue of the will of Elizabeth Harland; and they have ever since continued in possession of all the said estates, devised as aforesaid by the wills of Richard and Phillip Harland.

* 13 * The bill, after stating that Anne Trigg, the daughter of the said John Harland, the second son of the first testator, Richard Harland, having survived her husband, Richard Trigg the younger, died in August, 1826, intestate, without issue, and without any heir or heirs on the side of her father; and that the male line of her family was extinct, and that on her death the before-mentioned agreement or lease became determined; set forth the pedigree and claims of the respondents, as the cousins and heirs-at-law of the said Anne Trigg, on her mother's side, to the said rent of 300*l.*, up to the

decease of Anne Trigg, and to a third share of the said estates, hereditaments, and premises, and the rents and profits thereof, from the day of her decease.

The bill charged, among other matters, that the appellants pretended that there was in existence an heir-at-law *ex parte paterna* of the said Anne Trigg; whereas the respondents charged that the appellants set up that pretence merely to enable them wrongfully to continue in possession of the one-third part of the estates and hereditaments late belonging to the said Anne Trigg; for that they had no reasonable ground for making such pretence, as would appear if they would set forth the actual grounds on which they made such pretence; and as evidence of Anne Trigg's title, respondents referred to the lease above mentioned, by which they alleged that title was admitted.

The bill further charged that the appellants had frequently, by correspondence and otherwise, admitted the title of the respondents to the one-third part of the said hereditaments and premises, or some part thereof; and in such correspondence the facts and circumstances in the bill set forth, or some of them, had been admitted or noticed. It likewise *charged, that the appellants had in their custody or * 14 power the title-deeds, muniments, and evidences of title relating to the several estates and hereditaments in the bill mentioned, or some of them, and also divers other deeds, evidences of title, books of account, letters or extracts from letters, vouchers and writings, relating to the said several estates, or some of them, or to the share and interest of the said Anne Trigg therein, and relating to the rents and profits of the said hereditaments and premises, which had accrued due since her death, or relating to the several matters in the bill mentioned, or from which the truth thereof, if produced, would appear.

To this bill the appellants jointly and severally pleaded, "that Lois, the wife of Timothy Morine, of Wetherby, in the county of York, gentleman, formerly Lois Harland, was, at the death of Anne Trigg in the said bill named, and now is, heir-at-law of the said Anne Trigg, *ex parte paterna* of the whole blood; all which these defendants aver to be true, &c.;

and these defendants do plead the same to the whole of the said bill," &c.

This plea came on to be argued before the Vice-Chancellor in May, 1830, when his Honor overruled the same, being of opinion that it ought to be supported by an answer denying or explaining the correspondence. (a)

The matter of the plea was in the August following again argued on appeal before Lord LYNDHURST, then Lord Chancellor, but no judgment having been given before he resigned the great seal, his Lordship afterwards, by consent of the parties to the suit, delivered the following judgment in writing:—

* 15 * "In the case of *Emerson v. Harland*, I am of opinion that the plea was properly overruled, and that there are parts of the charge in the bill which require the plea to be accompanied with an answer and discovery, according to the principle laid down in *Saunders v. King*, (b) and *Gun v. Prior*." (c)

The appellants appealed to this House from both these decisions.

Mr. Swanston and *Mr. Wigram*, for the appellants.—We plead the title of *Lois Morine*, the heir-at-law *ex parte paterna* of *Anne Trigg*, as a bar to the claim of the respondents as heirs *ex parte materna*. This is an affirmative plea, the truth of which the appellants undertake to verify: if the fact alleged in it be true, the bill must be dismissed; and until the truth of that fact is disposed of, no further answer is required or can be called for. The bill contains such statements as, if not met by plea only, would involve the appellants in great difficulty and expense, from both which they ought to be permitted to protect themselves, tendering as they do to the respondents a fair issue as to the substantial fact on which they rely in their bill.

Lord REDESDALE, in his Treatise, (d) lays down the rule

(a) 3 Sim. 490.

(b) 6 Madd. 61.

(c) 1 Cox, 197.

(d) Fourth ed. p. 283.

that "if a plaintiff, in his bill, states that he has an interest which entitles him to call on the defendant for a discovery, though in truth he has no such interest, the defendant may protect himself by plea from making a discovery * which * 16 may involve him in difficulty and expense; as if the plaintiff states himself to be heir or administrator of a person who died intestate, and in that character seeks a discovery from the person in possession of property which did belong to the deceased, of his title thereto, or of the particulars of which it consists, the defendant may plead that another person is heir or personal representative." That rule is applicable to this plea. In a preceding page (a) of the same book, the mischief of making a discovery is illustrated. Lord REDESDALE, referring to the case of *Newman v. Wallis*, (b) in which Lord THURLOW overruled the plea that the plaintiff was not heir, says, "that decision was doubted by the learned Judge himself, in the subsequent case of *Hall v. Noyes*, (c) when pressed by the necessary consequence, that any person falsely alleging a title in himself, might compel a defendant to make any discovery which that title, if true, would enable him to require, however injurious to the defendant; so that any person might, by alleging a title ever so false, sustain a bill against any person for any thing, so far as to compel an answer; and thus the title to every estate, the transactions of every commercial house, and even the private transactions of every family might be exposed, and that in the name of a pauper, at the instigation of others, and for the worst purposes." But no doubt has been entertained since Lord THURLOW's time of the validity of negative pleas. *Drew v. Drew*, (d) *Saunders v. King*, (e) *Thring v. Edgar*. (g) The objections, however, to negative pleas do not apply to the present, which is an affirmative plea, and its validity must be tried by a different test from that which is applied to a negative plea.

* This is not denied to be a good plea, but the objection * 17 to it is, that it is not sufficient, without being accompanied with an answer to collateral matters charged in the bill.

(a) P. 230.

(b) 2 Bro. C. C. 142.

(c) 3 Bro. C. C. 483.

(d) 2 Ves. & Bea. 159.

(e) 6 Madd. 61.

(g) 2 Sim. & Stu. 274-278.

The most difficult part of a pleader's duty is, so to frame a plea and answer, as that the latter will not overrule the plea. Upon that point also, Lord REDESDALE, in his book, (a) says, "A defendant may also support his plea by an answer touching any thing not charged by the bill, as notice of title or fraud; for by such an answer nothing is put in issue covered by the plea from being put in issue, and the answer can only be used to support or disprove the plea. But if a plea is coupled with an answer to any part of the bill covered by the plea, and which, consequently, the defendant by the plea declines to answer, the plea will upon argument be overruled." What is put in issue by this plea is the fact of heir, and it is impossible to put in any answer to the evidence of that fact that will not overrule the plea.

The order overruling this plea was affirmed by Lord LYNCHURST, on the authority of the cases of *Gun v. Prior*, (b) and *Saunders v. King*. (c) The plea in the former case was, that the plaintiff was not heir-at-law of Ann Allen, for that he was only first cousin of the half blood, and not in any other manner related to her. Lord THURLOW held that to be a good plea in abatement; but there being a charge in the bill that one of the defendants offered the plaintiff 300*l.* if he would give up his claim as heir, his Lordship said that charge ought to be answered, and on that ground he disallowed the plea, with which he was satisfied in all other respects. In *Saunders* * 18 v. * *King* the plea of no partnership was overruled, on the ground that it should be accompanied by an answer to the facts specially charged as evidence of the partnership. We do not question the authority of these cases, but we say the circumstances in them are not like the present case, and the decisions are not applicable, for there are no allegations in this bill specially charged as evidence of the plaintiff's title. This distinction should be observed. Mere vague or general allegations in a bill cannot entitle the plaintiff to a discovery. *Jones v. Jones*, (d) *Frietas v. Dos Santos*. (e) It is a common form in a bill to call for books, muniments of title,

(a) P. 99.

(d) 3 Meriv. 161.

(b) 1 Cox, 197.

(e) 1 You. & Jerv. 574.

(c) 6 Madd. 61.

accounts and writings, but the answer to such call is upon motion for their production.

This form of plea has been recently much discussed both before the Vice-Chancellor and in the Lord Chancellor's Court. In *Thring v. Edgar*, (a) the Vice-Chancellor held that the answer to the main fact in the bill covered by the plea overruled the plea; and in *Pennington v. Beechey*, (b) his Honor held to be good a plea denying notice generally of a conveyance. These cases strongly support the plea in this case, but the later cases of *Tarleton v. Hornby*, (c) *Stanley v. Campbell*, (d) and *Hardman v. Ellames*, (e) are still stronger in support of it. We admit there may be cases in which the form of plea put in here would not be sufficient without answer also, as where fraud is charged in the bill, or where the bill charges a fact which, if true, would destroy the plea; in such cases an answer must accompany the plea, but this is not a case of that description. There is no allegation in this bill tending to defeat the matter pleaded; and, according to the rules of pleading, if the appellants * answered any * 19 part of the bill, the plea, which is to the whole bill, would by such answer be overruled.

Mr. Knight and *Mr. Spence*, for the respondents. — We admit that if there is a paternal heir of Anne Trigg in existence, those whom we seek to make heirs *ex parte maternâ* can have no claim. But why will they not tell us who and where the paternal heir is, what is the pedigree, and how entitled to this inheritance? Common sense decides that the respondents are entitled to this discovery. Is it likely that, if a paternal heir existed, he would not come forward to assert his title to property such as this? It is evident this appeal is brought from a spirit of litigiousness and a resolute perseverance in wrong, by which these appellants have contrived for four years and a half to withhold an answer to the respondents' bill. We have no doubt of the decision to which your Lordships will come on this case, but in respect of the costs we shall refer your

(a) 2 Sim. & Stu. 274.

(b) 2 Sim. & Stu. 232.

(c) 1 Y. & C. Ex. 333.

(d) 2 Myl. & K.

(e) 2 Myl. & K. 732.

Lordships to some cases. Besides the cases of *Gun v. Prior* and *Saunders v. King*, already referred to, Lord ELDON's decision in *Jones x. Davis* (a) is perfectly applicable, and one precisely in point. The bill there was for an account of stones taken from the plaintiff's quarry under a promise to account, and the bill charged that accounts were kept by the defendant. The plea there put in denied the promise only, but not that accounts were kept. Lord ELDON overruled the plea as not containing a negative that the accounts were kept; for the accounts, if produced, might show a promise to account. So in *Evans v. Harris*, (b) where the bill was for specific performance of a contract to grant a lease, charging collat-

* 20 eral facts as evidence of the contract, * and the defendant pleaded the Statute of Frauds, of no contract in writing, Sir THOMAS PLUMER overruled the plea, because it did not go to the collateral circumstances specially charged as evidence of the contract. The present bill charges that there is no paternal heir, and that the defendants often admit that in their correspondence. It is imperative on the appellants to deny or explain the correspondence, by answer. These cases, followed by Sir JOHN LEACH in *Saunders v. King*, by the present Vice-Chancellor, and by Lord LYNDHURST in the present case, decide the question now before your Lordships. We do not think it necessary to seek for other authority than these three Judges.

Mr. Wigram replied. — This appeal is not for litigiousness. The respondents have no right to a discovery of the grounds of the appellant's title. The object of a plea is to protect a defendant from discovery. If what this plea alleges be not true, then the respondents will be entitled to the discovery. The cases of *Jones v. Davies* and *Evans v. Harris* do not weaken our argument, for the bills in both these cases contained special allegations which the defendants to them were bound to answer; they went to prove the title of the plaintiffs in both cases, and not to disprove that of the defendants. Here are no special charges, but general allegations; if your Lordships once admit such form of allegations in a bill to be

(a) 16 Ves. 261.

(b) 2 Ves. & Bea. 361.

entitled to be answered by the production of books and other documents, no man's title can be safe.

THE LORD CHANCELLOR. — My Lords, I think this is a case which would receive light from a disclosure * by * 21 the appellants of the facts alleged in the bill. One ought not to be allowed to suppress a discovery of the evidence by which another proposes to prove his title. But although I am of opinion that the plaintiff has a right to the disclosure he asks, I wish, with your Lordships' permission, to take one or two days to look into my judgments in *Stanley v. Campbell* and *Hardman v. Ellames*, in both which I took occasion to examine most of the cases on this subject.

June 9.

THE LORD CHANCELLOR. — I delayed to move for your Lordships' judgment upon the question which arose on the pleadings in this case, until I looked into the case of *Hardman v. Ellames*, in which I took a view of all the cases decided on this point, and differed from some of them. I have, besides, looked again into the cases of *Thring v. Edgar*, *Saunders v. King*, *Newman v. Wallis*, and also *Hall v. Noyes*, where Lord THURLOW changed the opinion he formed in *Newman v. Wallis*, taking a different view of the subject, and in fact changing his former opinion. I have also looked again into the case of *M'Gregor v. The East India Company*, (a) having differed from the view taken by the Court below of that case, in my judgment in *Hardman v. Ellames* and *Stanley v. Campbell*. I find the present case, upon a full consideration of it, different from all the preceding cases; but I have no reason to doubt the correctness of the judgment given on it by the Vice-Chancellor, and affirmed by Lord LYNTHURST. I, therefore, move your Lordships that that judgment be affirmed, and the appeal dismissed, with costs not to exceed 150*l*.

Judgment below affirmed.

(a) 2 Sim. 452.

FROM THE COURT OF EXCHEQUER IN IRELAND.

THORNHILL AND OTHERS *v.* HALL.

1834.

THORNHILL and others *Appellants.*
 FREDERICK HALL *Respondent.*

Will. Construction.

It is a rule of the Courts, in construing written instruments, that when an interest is given or an estate conveyed in one clause of the instrument in clear and decisive terms, such interest or estate cannot be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate.¹

A testator recited *seriatim* in his will the interests he had in several leaseholds for lives, and after each recital he devises the rents and profits of each leasehold to his wife and a married daughter, and to each of his sons and unmarried daughters, severally and respectively, devising to his son R. part of the profit rent of Blackacre during the term of the lease, which was for the lives of the testator and of R. and another, and devising to his unmarried daughters *nominatim* different parts of the rents of Whiteacre, in addition to equal shares given to them by the preceding clause in the rents of another estate; "and further, if any of the above legatees should die, or die unmarried, he left the property bequeathed to them to be divided equally among the survivors of them." *Held*, that the devise to R. in Blackacre was for the whole term of the lives of the *cestuis que vies*, and was not on R.'s dying unmarried, cut down to an estate for his life only, by the clause of survivorship, but that the words of the clause applied to the last mentioned unmarried daughters only.

June 2, 6.

THE question in this appeal arose upon the construction of a clause in the will of James Badham Thornhill, of
 * 23 Thornhill Hall, in the county of Limerick, * who died

¹ See *Hearle v. Hicks*, 1 Cl. & Fin. 20; *Young v. Turner*, 8 Jur. N. S. 52.

in the year 1796, leaving his wife and nine children (five sons and four daughters), and considerable property, consisting chiefly of freehold leases of divers farms, underlet to tenants at profit rents.

The will, which bore date December 5th, 1794, and was duly attested for passing real estate, was, so far as it is material to set it forth here, as follows: "There appears arising to me out of the farm and lands of Flemingstown, I hold by a lease of lives under Lord and Lady Kingsborough, a profit rent of 233*l.* 10*s.* 5*d.* above the head rent of the same. I leave and bequeath to my dearly beloved wife, Elizabeth Thornhill, 200*l.* yearly of the said profit rent for her own sole use and benefit during her life, and at her decease 50*l.* yearly out of the same to my eldest daughter, Sophia Godsell, for her own sole use and benefit; this given more as a token of the great regard and affection I bear her, than thinking it necessary to giving her any more, being sensible in giving her the 1500*l.* she got as a marriage portion, I gave her a child's share, and got a suitable provision for her; the other 150*l.* yearly I leave to my wife Elizabeth Thornhill, to bequeath to which of our children she thinks most deserving of it by their duty and affection to her should she outlive me; the rest of the profit rent of said farm, being 83*l.* 10*s.* 5*d.*, together with all future uses out of it over and above the 200*l.* left to my wife, I leave to my fourth son James Badham Thornhill, now a minor, in part of what I intend for his support. And whereas there appears in the rental (not including the house and demesne lands) of Thornhill Lawn, over and above the head rents of the same, a sum of 674*l.* 1*s.* 3½*d.*; be it known that I leave 600*l.* yearly of the said present rent to my eldest son, Richard Badham Thornhill, together with *all emolu- *24 ments and benefits arising out of the same except the odd sum of 74*l.* 1*s.* 3½*d.* arising out of the same, which I leave to my third son, George King Thornhill, for his own sole use and benefit during the continuance and term in said lease. And whereas there also appears on the land of Killeen, taken from General Straton by purchase, and by him taken from said Lord and Lady Kingsborough, over and above the head rent of the same, a profit rent of 251*l.* 3*s.* 4½*d.*; now

be it known, I leave and bequeath 200*l.* yearly of the above profit rent to my now second son, Robert King Thornhill, for his own sole use and benefit, during the term of said lease, being for mine, his own, and his brother George's life; the residue, being 50*l.* 3*s.* 4½*d.*, I leave to his brother, my now third son, George King Thornhill, for his own sole use and benefit; any benefit arising out of said lease of Killeen, by rise of rent or times, to be for the benefit of my said son Robert (except as before excepted). And whereas there appears out of the farm and lands of Lisnalaniff, a profit rent of 51*l.* 4*s.* over and above the head rent, I leave and bequeath the same to my now said third son, George King Thornhill, together with all emoluments and benefits out of said lease, for his sole use and benefit during said term. And whereas there appears arising to me out of a dwelling-house in Michelstown, and other houses and land near said town, a profit rent of 48*l.* 11*s.* over and above the head rent, I leave and bequeath the same, with all benefits and advantages arising therefrom, to my now fourth son, James Badham Thornhill, for his sole use and benefit. And whereas there also appears out of the lands of Coolnemahogue a profit rent of 65*l.* 10*s.*, I leave and

* 25 bequeath the said profit rent, with all * emoluments and advantages, to my said son James Badham Thornhill, except 10*l.* yearly, which he is to pay yearly out of the same to my fifth son, Badham Thornhill. And whereas there appears out of the lands of Knockanevin a profit rent of 392*l.* 1*s.* 7½*d.*, I leave and bequeath 100*l.* yearly of the same to each of my three daughters, Anne, Caroline, and Elizabeth Thornhill; the residue of said profit rent, being 92*l.* 1*s.* 7½*d.* sterling, I leave to my fifth son, Badham Thornhill, for his sole use and benefit, together with all future benefits and emoluments arising out of the same (except as before excepted). And whereas there appears a profit rent of 79*l.* 15*s.*, arising out of a part of Thornhill Lawn, not included in the demesne and lands of Thornhill Lawn before mentioned, I leave said rent (not subject to pay any part of the head rent, that being already paid by the demesne and lands of said place), as follows: 30*l.* yearly of the same to my daughter Anne Thornhill; 29*l.* 15*s.* to my daughter Caroline; and 20*l.*

to my daughter Eliza, in addition to the sums of 100*l.* each left them out of Knockanevin: "And further, if any of the above legatees should die, or die unmarried, I leave the property bequeathed to them, with all benefits arising out of the same, to be divided equally, share and share alike, among the survivor or survivors of them; and also in like manner, if any of the lives in the leases should die, so as to leave any of the legatees unprovided for by the lapse or fall of said life or lives in any of the above bequests, that in such case a proportion shall be equally deducted from the bequests of each, to make up the deficiency by the determination of such lease as it shall so happen to fall, in proportion to the loss sustained, and in proportion of the property of the survivor or survivors."

* The testator then recites, that three sums of 3000*l.*, * 26 500*l.*, and 800*l.*, were due to him from different persons, all which he left to "pay all the bond and judgment debts justly due of me; the residue or surplus of the same, being, I am sure, of a large amount, I leave to be divided, share and share alike, among all my legatees, wife and children, mentioned in this will, Mrs. Godsell included."

The testator executed a codicil to his said will, bearing date the 29th day of March, 1796; and thereby, after stating that his daughter Anne had married R. T. Rye since he had executed his will, and that on her marriage he had given his bond to R. T. Rye, payable in five years, for 1000*l.*, in lieu of a bond for 1000*l.* of one David Bradshaw, he leaves the last-mentioned bond to R. T. Rye, to discharge his own bond for 1000*l.*; and directs that the annuity of 130*l.* he had left to his daughter Anne should be left with R. T. Rye, until he was paid 500*l.* promised him at the testator's death; or if R. T. Rye should prefer to have the said annuity instead of the bond, then the testator directs that the amount of Bradshaw's bond should go equally divided, share and share alike, between his daughters Caroline and Elizabeth Thornhill, in addition to what he left each of them by his will; but if not, and R. T. Rye should prefer to take the bond and the annuity of 130*l.*, until he is paid the 500*l.* promised to him, or any deficiency of the 1500*l.*, should any happen, he is then to

keep the before-mentioned annuity until he is paid all, and then hand it over to the testator's daughters Caroline and Elizabeth Thornhill; 80*l.* a year of it to Caroline, and the remainder of it, being 50*l.* yearly, to Elizabeth, in addition to their former bequests. And the testator, by the said codicil, next proceeds, in an event therein mentioned, to

* 27 * cut off his son Richard to 300*l.* yearly demesne, and all the trees on Thornhill Lawn; the rest, being 300*l.* yearly, he leaves to pay his judgment debts.

The testator died on or about the 1st day of December, 1796, leaving his wife and all his said children surviving him.

Upon his death, Robert King Thornhill entered into the receipt of the rents and profits of the lands of Killeen and its subdenominations, and continued to receive the same until the year 1800; when, by an indenture bearing date the 20th April in that year, for valuable consideration he conveyed the same to Robert Hall, father of the respondent, his heirs and assigns, during the lives and life of him Robert King Thornhill and George King Thornhill, who were the then surviving *cestuis que vies* named in the head lease, subject to the head rent and to the annuity of 51*l.* 3*s.* 4½*d.* bequeathed to George King Thornhill, and to an annuity or rent-charge of 170*l.*, to be issuing out of and chargeable upon the lands, and payable to Robert King Thornhill during his life. By another deed, bearing date the 30th of June, 1804, Robert King Thornhill, for valuable consideration, viz. 393*l.*, released the said Robert Hall, and the lands of Killeen and its subdenominations, from the payment of the sum of 56*l.* 5*s.* per annum, part of the annuity of 170*l.* reserved by the former deed. By a third indenture, bearing date January, 1817, and made between the said Robert King Thornhill and the respondent, as trustee for the said Robert Hall, in consideration of the sum of 625*l.* 12*s.* 6*d.*; the said Robert King Thornhill conveyed and confirmed to the respondent, his heirs, executors, administrators, and assigns, the residue of the said annuity of 170*l.*

* 28 * Robert Hall, by indenture bearing date the 30th day of May, 1819, conveyed the lands of Killeen and its subdenominations, with other estates and interests therein

mentioned, upon trusts, for the benefit of Robert Hall and Catherine his wife, for their respective lives, and after the death of the survivor of them, in trust for the absolute benefit of the respondent; and he, on the death of the survivor of them some years afterwards, entered into possession or into the receipt of the rents of the said lands of Killeen and its subdenominations, by virtue of the will and deeds above mentioned, subject to the annuity of 51*l.* 8*s.* 4½*d.* bequeathed to George King Thornhill, as before stated.

Robert King Thornhill died in 1825, whereupon his mother and his surviving brothers and sisters, the appellants, claimed to be entitled, share and share alike, to the interest in the said lands of Killeen and its subdenominations, by virtue of the clause of survivorship in the will of James Badham Thornhill; and accordingly, in Easter term, 1826, the appellants brought their action of ejectment on the pleas side of the Court of Exchequer in Ireland, for the recovery of the possession of the said lands. The ejectment having gone down for trial at the assizes, a special verdict was agreed upon, for the purpose of having the opinion of the Court upon the construction of the said will, touching the devises hereinbefore mentioned. That verdict having come on for argument in Michaelmas term following, the Court suggested that the estates devised by the said will of and in the said lands, were merely equitable, and that the legal estate therein had descended upon the appellant, Richard Badham Thornhill, the testator's eldest son. The Court was pleased to respite judgment * upon the verdict until the then ensuing term, for the * 29 purpose of enabling the respondent in the mean time to file a bill against the appellants.

The respondent accordingly, in January, 1827, filed his bill on the equity side of the said Court of Exchequer against the appellants, stating the several matters and things now stated, and praying that the appellants might be restrained by injunction from proceeding further in the said ejectment, and that the respondent might be decreed entitled to the estate and interest in the said lands of Killeen, devised to the said Robert King Thornhill by the said will, for the lives of the *cestuis que vies* named in the lease of the said lands;

and that, if necessary, the appellant Richard might be declared a trustee for the respondent in respect of the said lands.

The cause having come on to be heard in the June following, the Court of Exchequer decreed: "That Robert King Thornhill, upon the death of his father, became entitled, by virtue of the devise contained in the will of his father, to the entire estate and interest which the testator had in the lands of Killeen, that is to say, an estate for life of himself the said Robert King Thornhill, and of the defendant George King Thornhill, subject to the annuity of 51*l.* 3*s.* 4½*d.* charged thereon for George King Thornhill, and subject also to the yearly rent of 600*l.*, payable under the lease under which the said James Badham Thornhill held the said lands; and that Frederick Hall (the respondent) was entitled, under and by virtue of the several deeds in the pleadings mentioned, to all the estate and interest which was so devised to the said Robert King Thornhill in the said lands; and it was declared that the defendant Richard Badham Thornhill, in

* 30 * whom the legal estate in the said lands vested as heir-at-law of the said testator, for the benefit of the said Robert King Thornhill, was then a trustee for the respondent in respect of the said lands and premises."

This appeal was from that decree.

Mr. Tinney and *Mr. J. Jervis*, for the appellants. — In the event, which has happened, of Robert King Thornhill's dying unmarried, the interest bequeathed to him is vested in the appellants by virtue of the clause of survivorship; for there is nothing on the face of the will or in the nature of the gift to lead to an inference that the testator did not intend what he so clearly expressed in that clause to be applicable to all the preceding bequests. The devise to Robert King Thornhill was sufficient, it is true, to pass the whole of the testator's interest in the lands of Killeen to him, if it was not cut down by the subsequent clause. The question whether it was or was not cut down depends on the meaning of the testator in the use of the word "above" in that clause: "If any of the above legatees should die, or die unmarried, I leave the property bequeathed to them, with all benefit arising out of the same, to be

divided equally among the survivors." What can be plainer than the meaning of that clause? The word "above" must be taken to mean all the legatees before mentioned, Robert King Thornhill included. The like extensive meaning must unquestionably be given to the word "said" in the following part of the same clause: "And if any of the lives in the leases should die, so as to leave any of the said legatees unprovided for by the lapse or fall of said life or lives in any of the above bequests, a proportion shall be deducted *from the bequest of each, to make up the deficiency * 31 by the determination of such lease, in proportion to the loss sustained and to the property of the survivor or survivors." The case of the respondent is, that the "above legatees" apply only to the daughters last mentioned; but we submit that these words have as extensive an application as the words "said legatees" and "the above bequests," in the latter part of the same clause, and your Lordships will see that it is inconsistent and insensible to restrict that part of the clause to the daughters. The whole clause must be taken and read together; and if so taken, the words "the above legatees" must include all those before mentioned, except the testator's wife and Mrs. Godsell, of whom he cannot be understood to say "if they should die unmarried." Besides, he gave the wife no interest that could survive her; he gave her 200*l.* a year for life, to go over after her death, in default of appointment. It is also conceded that the appellant Mrs. Godsell was not intended to take any further benefit, she being then married, and the testator having stated that she had been amply provided for, although he afterwards gives her an interest in the residue.

Whenever the testator uses the words "above" or "said" or "aforesaid," in all other parts of his will, he repeats and annexes to them the particular antecedent; as, "I leave 600*l.* yearly of the said rent (of 674*l.*), except 74*l.*, &c., to Robert King Thornhill, with all benefits, &c., except the above odd sum of 74*l.* &c.;" again, "the profit rent of 251*l.* &c., I leave 200*l.* yearly of the above profit rent;" and again, "my said son Robert." In all these and other passages the testator repeats the immediate particular antecedent, but in

the passage now in discussion he uses the general expression, "the above legatees," as * applicable to and comprehending all the antecedents. That is the common acceptation of the word "above" in the construction of all written instruments. The preceding clauses of the will give separate bequests to the legatees *seriatim et nominatim*: then comes this clause of survivorship applicable to all the "above legatees," the "legatees before mentioned," the "said legatees;" and next and last comes the residuary clause. By our construction of the will, it is sensible, orderly, and consistent.

Mr. O'Connell and *Mr. Bagshawe*, for the respondent.—The interests of two of the appellants is abandoned by their own counsel. The testator's widow and his daughter, Mrs. Godsell, admit by their counsel at your Lordships' bar, that they do not come within the description of the "above legatees" in this clause. By what peculiarity is the devise to Robert King Thornhill distinguished, so as to bring him within those words? The terms of the devise to him are sufficient to pass absolutely to him the whole interest of the testator in the lands of Killeen, subject to the annuity of 51*l.* given to George King Thornhill. In order to cut down the unlimited interest so given, and reduce an absolute devise to a life-estate, to support the construction contended for on the other side, there must be clear express words in some other part of the will, removing all doubt as to the testator's intention. There are no such words in any part of the will or codicil. Can the absolute interest given to Robert King Thornhill, in one clause, be cut down by a remote clause from which he takes no benefit? The counsel for the appellants admit that there is an ambiguity in the latter clause, but none in the * 33 former. The * general intent of the testator is clear in making provision for his family. The devise to Robert King Thornhill is as absolute as the clearest terms could make it. We submit that it is the law of the Courts, in construing written instruments, never to break in upon the general intent of the maker, nor cast a doubt upon what is clear, by suggesting a possibility of an after-thought, or discovering an ambiguity in some other part of the instrument. The general

intention is not to be defeated by any imagined particular intention. Protecting the respondent by reminding your Lordships of that established rule of construction, we still deny that there is any obscurity or difficulty in interpreting the meaning of this testator. Your Lordships, looking to the whole scheme of the will, can clearly see the intention through the confused expressions of an ignorant dying man, who, being of an untechnical mind, in drawing his will, applies the word "above" to the next or last-mentioned, and not to all the before-mentioned legatees.

But apart from the argument on the general intent, taking a philological view of the words, we hold that, according to grammatical construction, the words "above legatees" refer to the testator's three unmarried daughters only. There is nothing in any part of the will from which any intention of the testator contrary to that construction can be inferred.

The testator, in another part of his will, uses the word "above" in the sense of "last-mentioned;" but when referring to what has gone before, but not immediately before, he uses the compound word "before-mentioned." When he is desirous of describing his wife and all his children by the word legatees, he enumerates them in the following way:

"All * my legatees, wife and children, mentioned in this * 34 will, Mrs. Godsell included." There can be collected from the whole will and codicil, an intention to make a different kind of provision for the testator's unmarried daughters, from the provisions made for his sons and his married daughter. On the one hand, his unmarried daughters are appointed his residuary legatees; and after his daughter Anne was married, in his lifetime, by the codicil he took away from her the provision made for her by his will, and gave it to his two daughters who remained unmarried. On the other hand, in making provision for his married daughter and his sons, he uses the phrases "for her" or "his sole use and benefit," and "during the continuance of the lease," or "term;" while in the devises in his will to his three unmarried daughters, there are no such words, and no words which indicate any thing more than a life-estate in what is devised to them respectively. The words "above legatees," if extended beyond the testa-

tor's unmarried daughters, must include the appellant, James Badham Thornhill; and the clause in which they occur must extend to the profit rent of 65*l.* 10*s.* devised to him: whereas it is manifest that the devise to him must have been meant to pass an absolute interest, inasmuch as the will contains a direction for him to pay 10*l.* a year out of the same, during the term which the said testator had therein, to Badham Thornhill; an intention inconsistent with his having an interest therein of a less duration than the duration of the said term. So again the same words, if extended beyond the testator's unmarried daughters, must include the appellant, Richard

Badham Thornhill, and must cut down the annuity to * 35 him of 600*l.* out of Thornhill *Lawn, to a life-estate.

But it is manifest that the testator intended Richard Badham Thornhill to take an absolute interest therein, inasmuch as, in an event mentioned in the codicil, one-half of the said yearly sum of 600*l.* is devised for the payment of the testator's judgment debts; an intention quite inconsistent with the supposed intention that the 600*l.* a year should be divided among the surviving brothers and sisters, on the death of Richard Badham Thornhill. If the testator had intended to cut down the interest devised to Robert King Thornhill to a life-estate, he would have done so in express terms; inasmuch as when he intends to devise an estate to his wife for her life, he expressly devises to her "for her sole use and benefit during her life." The testator expressly states, that he considered a child's share 1500*l.*; but the provision made by the testator for his son Robert King Thornhill would be of far less value than that sum, if his interest in the said lands was cut down to a life interest only.

June 6.

THE LORD CHANCELLOR. — My Lords, this question, which comes before your Lordships from the Court of Exchequer in Ireland, depends entirely upon the construction of the will of James Badham Thornhill, and upon two passages in that will. Upon a question of construction it is not often that so elaborate an argument has been urged at this bar, or in any Court which I know, as has been addressed to your Lordships upon

the construction of this instrument. I do not complain of it, for the more thoroughly sifted, the more minutely the parts are examined, the more accurate is likely to be the result to which your Lordships are able to come, and * the * 36 more confident the opinion which in your judgment you pronounce.

My Lords, I confess from the beginning of this argument, though I listened with very great attention to the discussion of the matter by the learned counsel for the appellant, both in his opening speech, as well as the reply, that the impression upon my mind has been very distinct, very decided in favour of the judgment of the Court below. I hold it to be a rule that admits of no exception, in the construction of written instruments, that, where one interest is given, where one estate is conveyed, — where one benefit is bestowed in one part of an instrument by terms clear, unambiguous, liable to no doubt, clouded by no obscurity, by terms upon which, if they stood alone, no man breathing, be he lawyer or be he layman, could entertain a doubt, — in order to reverse that opinion, to which the terms would of themselves and standing alone have led, it is not sufficient that you should raise a mist; it is not sufficient that you should create a doubt; it is not sufficient that you should show a possibility; it is not even sufficient that you should deal in probabilities, but you must show something in another part of that instrument which is as decisive the one way as the other terms were decisive the other way; and that the interest first given cannot be taken away either by *tacitum* or by *dubium*, or by *possibile*, or even by *probabile*, but that it must be taken away, and can only be taken away, by *expressum et certum*.

My Lords, I have disposed of this case in stating this clear and undoubted proposition. The very learned, experienced, and able counsel that argued this case on behalf of the respondent with an exemplary * conciseness, and as suc- * 37 cinctly as he argued it distinctly, relied upon this view alone, for it is decisive of the present question. Let us apply this rule to the facts of this case. The testator states in his will, "I leave and bequeath 200*l.* yearly of the above profit rent to my second son, Robert King Thornhill, for his own

sole use and benefit," — here is the *habendum*, — "during the term of said lease, being for mine" (the testator), "his own and his brother George's life;" and he afterwards says, "any benefit arising out of the said lease of Killeen, by rise of rent or times, to be for the benefit of my said son Robert, except as before excepted." Here, therefore, is the subject-matter of the devise or bequest, — a lease for three lives, and, mark, one of those lives being the testator's own, another being George's, and the third is the legatee's, a very material circumstance in this discussion. Now upon this (which, if it stood alone, is an absolute devise to A. of a leasehold interest for the remainder of the lives of the *cestuis que vies*), the question is, whether what follows is sufficiently distinct to take away that plain, clear, and intelligible, and undeniable and absolute bequest. And it is after having given certain parts of the profit rent of another lease to the three daughters Anne, Caroline, and Elizabeth, the residue of that rent to Badham, his fifth son, that the word "whereas" occurs, which always indicates the introduction of something to follow, and, generally speaking, indicates a change from one subject of discussion, or of handling or of dealing with, to another which is different. "And whereas there appears a profit rent" (then describing it) "now be it known, I leave said rent, not subject to pay any part of the head rent, that being already paid by the demesne

* 38 * and lands of the said place, the above profit rent as follows; viz., 30*l.* yearly to Anne, 29*l.* 15*s.* to Caroline, and 20*l.* to Eliza, in addition to the sums of 100*l.* each, left them out of Knockanevin, together with all future advantages, if any should arise out of the same." Then came the words that are said to alter the preceding clear part: "and further, if any of the above legatees should die, or die unmarried, I leave the property bequeathed to them, with all benefits arising out of the same, to be divided equally share and share alike, among the survivor or survivors of them." It is clear, if these words stood alone and without reference to the immediate preceding bequests alone, they would operate clearly a life-estate to Robert, and it is clear that if the other words of bequest to him stood alone they would give him an absolute interest. Then the question is whether, if those latter words

would qualify it to a life-estate, they do or not apply to Robert. The words are "if any of the above legatees." The "above legatees" may mean all the above legatees, including Robert, or a part of the legatees, namely the latter part, being applicable to the last antecedent. Is this not decisive of the present question? Here are terms which, taken altogether, may, or may not apply to Robert, and may, or may not qualify the interest given to Robert by themselves, if they stood alone, to a life interest, if "above" refers to him and not to the last antecedent. Here is that which may apply to either, here is that which is doubtful, here is that which is not of necessity or by necessary implication to be held to cover Robert's interest, and you are called upon in the face of a devise clearly giving to Robert an absolute interest, to elect between two possibilities, to convert what is doubtful into a certainty, * and to convert that which is absolutely certain into * 39 absolute *dubium*, or something the very reverse of certainty: that disposes of the question and leaves it without any doubt.

What I am about to add is, I may say, by way of supererogation, and to show that not a vestige of ground remains for differing with the Court below. The first remark I add, unnecessarily, is this: It is said, if you are to go to the last antecedent a doubt is raised; but if you stop at the "whereas," and begin at the bequest to the three unmarried daughters, and the son Badham, and the 100*l.* part of the other profit rent, there is no reason why the arrangement made in the latter clause, under the description of the "above legatees," should be confined to apply to the second profit rent, and not extend to the 100*l.* also. I meet that by these observations: the frame of the clause as to "unmarried," seems rather to apply to the daughters, that is, the unmarried daughters, rather than the sons; that would make it possible to carry back this to the three daughters, including Badham Thornhill, as regards their 100*l.*, as well as regards that which comes after. But in the next place, and that is the second remark I have to make, there is a reference made to the 100*l.* without going back beyond the "whereas;" without stepping over the break, there is a reference made to the 100*l.* in the part

immediately antecedent to "the above legatees," where he is dealing with the second profit rent, for he says, "I give them that in addition to the 100*l*." I have known, over and over again, the Courts of Law and Equity in this country, with no better reference to a gift, to imply a new character and add a new qualification to a gift before given, with even less distinctness of reference than there is to the 100*l*., and

* 40 * I have very little doubt that this is sufficient to be made applicable to that 100*l*.

But (and that is the last reason upon which I rely), take it whichever way you will, even if you were to concede that it extended to the profit rent *ultra* the 100*l*., it is a much more probable supposition, and does much less violence to the construction of the instrument and the clear intent of it, than the opposite construction, which would by the word "above" make it spread over the whole preceding part of the will. My reason for so saying leads me to the last of the general observations which I think superfluous, and that is this: I cannot conceive a more clumsy, a more roundabout (I will not say, merely inartificial, but a more absurd and indistinct course of expression, for the purpose of showing his intention, cannot be conceived), than the argument in favour of the appellants, and against the judgment under appeal, would suppose him to have used. They say he means to give him a life interest; a life interest in what? an estate *pour autre vie*, the *cestuis que vies* being A., B., and himself. It is merely saying, I give a man a life interest in a leasehold estate upon lives. Would it not be a more obvious course to say, I give Robert the estate of Knockanevin, or whatever it is, the estate of Blackacre, for his own life and no longer, and not for the lives of the other two *cestuis que vies*? Because your attention is here called to a life interest; you are not dealing with a *corpus* in which a life interest has nothing to do, but with an estate *pour autre vie*, one of the *cestuis que vies* being the donee; and therefore the natural and proper course would have been to say, here is an estate for three lives, of which you, Robert, are one; take it for your own life, but not for the other lives. I can-

* 41 not doubt upon the * will. I hold it to be as clear a case as ever came before your Lordships; and though I

am not unaware of the force of the argument of *Mr. O'Connell*, that there is here a symptom of perpetual charge, though that is not quite so clear as the other, but that there is an intention manifested to charge the estate beyond the life of Robert; if so, that would be perfectly decisive; but I put it upon the effect of those parts of the will I have read to your Lordships, and I move your Lordships that this judgment be affirmed with costs.

The judgment was accordingly affirmed, with costs not exceeding 150*l*.

* WRIT OF ERROR

* 42

FROM THE COURT OF KING'S BENCH IN IRELAND.

ROWE v. ATTORNEY-GENERAL IN IRELAND.

1834.

RICHARD RADFORD ROWE, ESQ. . . . *Plaintiff in Error.*
 HIS MAJESTY'S ATTORNEY-GENERAL IN }
 IRELAND. } *Defendant in Error.*

Pleading. Issue. Inferior Court.

An indictment was removed from an inferior Court into the Court of King's Bench in Dublin, after plea pleaded and issue joined thereon; the issue thus joined is not such "an issue joined in the Court of King's Bench" as will satisfy the words of the Statute 17 & 18 Car. 2, c. 20, and cannot therefore be tried under the authority of that statute at the *Nisi Prius* sittings of that Court.

April 11.

THIS was a writ of error from a judgment of the Court of King's Bench in Ireland. An indictment for subornation of perjury had been found against Mr. Rowe, at the sessions

of Oyer and Terminer for the city of Dublin. The defendant pleaded "not guilty." The indictment was afterwards removed to the Court of King's Bench in Dublin. The defendant was there convicted, and judgment pronounced. That judgment was brought by writ of error into this House. When the case was called on, it was stated that no counsel appeared on behalf of the plaintiff in error.

Lord DENMAN inquired into the cause of this circumstance.

Mr. Ullithorne, the agent for the plaintiff in error, stated that when this case had been before their Lordships on * 43 a previous occasion, the plaintiff in error had declared his inability to pay the fees; and the House had then assigned *Mr. Follett* as his counsel; and that gentleman had kindly undertaken the duty; but he was at present on the circuit, and Mr. Ullithorne therefore applied to their Lordships to have the case postponed till his return.

Lord DENMAN intimated to the Attorney-General that the House would be glad to hear him on the first of the errors assigned; namely, that in this case the issue had only been joined in the inferior Court from which the case was removed by *certiorari*, but that no issue had been joined in the Court of King's Bench.

The Attorney-General (Sir J. CAMPBELL) contended, that the issue had been regularly joined in the inferior Court, and as the plaintiff in error had, upon the record thus made up after it had been removed into the superior Court, proceeded to trial, he must be taken in the superior Court to have abided by his plea, and that now, after verdict, the irregularity was waived.

Mr. Wightman was with the Attorney-General, but was not heard upon the question.

Lord DENMAN said that the question on the validity of which this writ of error depended, was whether the trial which

had taken place in the Nisi Prius Court at Dublin had been had in pursuance of the Irish Statute 17 & 18 Car. 2, c. 20, by which the Chief Justice was authorized to try at Nisi Prius issues joined in the Court of King's Bench. The question here was whether this was an issue which could be said to have been joined in the Court of * King's Bench. If * 44 it was not, then the objection to the proceedings was in the first instance fatal. It appeared to him extremely doubtful whether any issue joined in the Court of Oyer and Terminer could be said to be an issue joined in the Court of King's Bench. It was argued, however, that this objection had been cured by the defendant (now plaintiff in error) having proceeded to trial upon the record so made up. Without expressing his own opinion on that point, he should propose the following question to be put to the Judges. His Lordship then proposed the question, which is stated at length in the opinion delivered by Lord Chief Justice TINDAL on behalf of himself and the other Judges.

LORD CHIEF JUSTICE TINDAL. — My Lords, the question proposed to His Majesty's Judges is this: "A bill of indictment for subornation of perjury having been found at the sessions of Oyer and Terminer for the city of Dublin, and the defendant having pleaded not guilty, and issue being there joined thereupon, the indictment and proceedings, with all things touching the same, being afterwards removed into the Court of King's Bench, whether a legal trial of that issue can take place at Nisi Prius, in the same Court, under the Irish Statute of 17 & 18 Car. 2, c. 20?" and upon this question, after hearing the arguments at your Lordships' bar, we are of opinion that no legal trial of the issue could take place under the circumstances above stated.

If this point had depended solely on the consideration of what part of the record is removed by the *certiorari*, it would have been extremely difficult to contend that the trial could have been legal; for although in point of form the whole of the record may be removed into the superior Court by the * general words of the writ of *certiorari*, yet by the * 45 universal course and practice of the Court, which course

of the Court is the law of the Court, and of which the Judges are bound to take notice, no other part of the record but the bill of indictment itself is filed of record, and the party subject to such indictment is called upon by the superior Court to plead *de novo* to the indictment when removed; and accordingly, he may to such indictment when so removed, instead of the general issue which has been pleaded in the Court below, either plead a special plea, or may demur, or plead a pardon; as he may be advised under the circumstances of the case. Upon this point, therefore, we should be inclined to hold that no legal issue has been joined between the Crown and the defendant, and unless the issue has been properly joined there can be no legal trial.

But the question put by your Lordships involves another and more important point; viz., assuming that the whole record is properly removed into the superior Court, whether, under the proper construction of the Act of 17 & 18 Car. 2, there was any authority given to that Court to proceed to try the issue? and it appears to us that the statute gives no authority for trying the issue in the superior Court. The object of the Act was to prevent the inconvenience of trials at bar in the very numerous cases which at that time occurred, and for that purpose the statute proceeds to define what cases should in future be tried and triable at Nisi Prius, by the Chief Justice of the Court of King's Bench. The statute therefore, after stating the difficulties which had occurred in practice, proceeds to enact "that from henceforth the Chief Justice of the King's Bench for the time being, upon issue joined or to be joined in the Court of King's Bench or

* 46 in the * Court of Chancery, &c., shall try the same at Nisi Prius, &c." Now the great accuracy with which this is penned ought to be kept in view. It is not confined to issues joined or to be joined in the Court of King's Bench; but as it is well known that issues joined in the petty bag office of the Court of Chancery are, without any intermediate proceeding, triable in the Court of King's Bench, the statute extends to and includes them also. The whole question, therefore, turns upon the construction of the words above referred to. And we cannot think, by any reasonable con-

struction, an issue joined in an inferior Court can be held to be issue joined or to be joined in the Court of King's Bench. Upon this ground, therefore, we are all of opinion that the Court of King's Bench in Ireland had no jurisdiction under the statute to try the issue above raised.

LORD DENMAN. — My Lords, the learned Judges having given an answer to the question proposed by your Lordships, I take the liberty of expressing my entire concurrence in the opinion so given, both on the ground of the object of the statute in question, which was made to render it unnecessary to try at bar cases that otherwise would have been tried there, and also with reference to the situation of the party, who clearly must have a right, when the proceeding is removed into the Court of King's Bench, to withdraw the plea which he may have hastily pleaded below, and to adopt that line of defence which may be suggested to him in the new situation in which he is placed. It is possible he may have discovered some fatal objections to the bill of indictment itself, and may wish to demur to it, or he may be advised to plead special matters, the decision upon which by the higher Court into which the case is removed * may render it unnec- * 47
essary to answer at the bar of criminal justice for the offence charged. It is my intention, therefore, to move your Lordships that the judgment which has been given in the Court below be reversed; but inasmuch as that judgment was given nearly five years ago, and it appears a great hardship that a person entitled to have a judgment against him reversed has been so long detained under that judgment which turns out to be invalid, I would take the liberty of adding that the party has very much brought this upon himself by assigning a variety of errors, to the number I believe of thirty-four, the great majority of which presents no matter of doubt. Many of them arrange themselves under the name of something very nearly approaching to nonsense, and suggesting a variety of things which no person in an official situation could be expected, from the first view of the thing, to look through and to be able to meet without considerable labour, in consequence of the great extent of the statement.

Delay has also arisen from another cause: the House was about to appoint a day for hearing the argument; the defendant, it appeared, was extremely desirous of being brought over to argue the case himself, but it appeared that he had no funds, and the House of Lords had no power to pay the expenses of his being brought over. My Lords, upon looking into the case it appeared to me that it was our duty to call upon the learned counsel for the Crown to support the judgment of the Court below, if he felt that he could do so. The learned Judges being of opinion that that judgment cannot be supported, I will not detain your Lordships further than by moving that the judgment be reversed.

Judgment reversed.

FROM THE COURT OF CHANCERY.

ATTORNEY-GENERAL v. FORBES AND OTHERS.

1834.

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| THE ATTORNEY-GENERAL | <i>Apellant.</i> |
| SIR CHARLES FORBES, Bart., GEORGE JACK- SON, and Others | } <i>Respondents.</i> |

Legacy Duty.

A testator born in Scotland, but having for many years resided in India, died there, leaving real and personal property situated in India, but no assets in England. By his will and testamentary papers, all executed in India, he left the whole of his property, in equal divisions, to his four natural children or the survivors of them, and their heirs, subject to some small legacies and annuities. His executors, who were in India before and at the time of his death, having obtained an Indian probate, paid the debts and bequests, and got in the testator's estate and converted the principal part thereof into money, which they

sent to their bankers in England, and afterwards invested in the funds in their own names. A suit was afterwards instituted in the Court of Chancery in England, to ascertain the claims of the residuary legatees under the will; whereupon the stock was transferred into the name of the Accountant-General of the Court of Chancery, and that Court made a decree declaring the shares of the several claimants. In that suit a claim was made on behalf of the Crown, for the legacy duty on the residuary fund. *Held* by the House of Lords, affirming the judgments of the Courts below, that legacy duty was not payable on the legacies, annuities, or shares of the residue bequeathed.¹

April 28, June 9.

THE question in this appeal was, whether the residue of a testator's estate, brought from India to England, was liable to payment of the legacy duty under the circumstances here stated: Colin Anderson, deceased, a native of Scotland, was in his lifetime, *and at the time of his *49 death, seised of some real estate in the East Indies; and was also possessed of considerable personal estate and effects, all of which, at the time of his death, and of making his will and codicils, hereinafter stated, were in India, where he was resident for some time before, and until his death. Being so seised and possessed, he duly made and published his will, bearing date the 25th October, 1802, and thereby desired that his house and grounds in the island of Coolabah, together with his household furniture, horses, liquors, &c., might be sold, and the produce placed to the credit of his estate; and after noticing, that on the 1st of January, 1803, he should have assets in India to the amount therein mentioned, and that he was entitled to any other division of prize-money which might thereafter be made for Columbo and Seringapatam, and to whatever might be given to the captors of Kurrée, on both which services he was head surgeon; and also noticing that there was one boy at home, named Colin Anderson, born on the 25th day of October, 1788, then at school at Glasgow; that there was one girl in India, named Jane Jarvis Anderson, born at Poondamalee,

¹ See *Thompson v. The Advocate-General*, 12 Cl. & Fin. 1, and notes; *Jefferys v. Boosey*, 4 H. L. Cas. 926, 927; *Arnold v. Arnold*, 2 Myl. & Cr. 256, 270; *Wallace v. Attorney-General*, L. R. 1 Ch. Ap. 1; 1 *Jarman Wills* (3d Eng. ed.), 2 note (f).

on the 2d day of October, 1797 ; that there was one girl in India, born at Mangalore, on the 21st day of September, 1800, named Ann Nesbitt Anderson ; that there was another child (viz. Caroline Erskine Anderson), in India, born at Coolabah on the ; to those children, or the survivors of them, and their heirs, he left the whole of his property, in equal divisions, subject to such regulations and legacies as he should thereafter mention. And it was his wish, that his brother, Lieutenant Patrick Anderson, should come to Bombay as one of his executors, and take the
 * 50 children then in * India to England with him ; and as that duty might put him to some expense and inconvenience, he bequeathed to him 500*l.* sterling, as some kind of recompense.

The testator, by his said will, gave certain annuities to different persons in England and in India ; and to provide for those legacies, and the education of the children, his executors were thereby directed to place the whole of the estate securely at interest, either on landed property or in some public funds ; but he left the choice entirely to the executors. As the annuitants died, the principal producing such annuity was to revert to the common stock, for the benefit of the whole ; as the whole of the estate was to be equally divided amongst the before-mentioned four children, or the survivor of them, a regular division must be made of the estate when each came of age, or was married ; and the share of such person was not to be considered any longer as belonging to the public stock, but to the particular person so coming of age, if a boy, subject however to the control of the executors, their heirs and assigns, for nine years more, when he would have arrived at years of discretion, if ever ; when the girls, or any of them, became of age or got married, he directed that their shares might be so settled on themselves during their lives, and on their children, in equal proportions, after their death, that it would not be in the power of the husband, if so inclined, to injure either the wife or the children. The share or shares of one or more of such children dying without issue, were to be equally divided amongst the survivors ; but in case of issue, those children were to inherit the share of

their parent, amongst them equally; and in case of their dying without issue, it was to return for the benefit of the survivor of those four children, * or their families. * 51 Upon the reversion of any sums to the public stock, the issue of a deceased child was to have the share that its parent would have had if living; but again, if such issue died without issue, the whole of its original and after shares reverted to the common stock. And he thereby appointed his brothers Alexander Anderson and Patrick Anderson, Brevet Lieutenant-Colonel Lachlan Macquarie, and the respondent, Sir Charles Forbes, then Charles Forbes, of Bombay, Esq., executors of his said will.

The testator afterwards made a codicil, or testamentary paper, dated the 4th of July, 1804, and addressed the same as a letter to the said Patrick Anderson, and which was (amongst other things) to the effect following: "If I should be so unfortunate as to meet with any accident to prevent my getting to Bombay soon, you must endeavour to get leave, and go home in charge of these infants, place them at school, and be in some degree their father." And further, "After fitting out my children for the voyage, and paying for your and their passage, the whole of my property in Bombay I would have lodged in the company's funds; and the expenses of the children's education, together with such other legacies as I have mentioned in my will, to be defrayed out of the interest of this money; and any surplus which may remain, after defraying these expenses, is annually to be added to the principal, until the children are of age." And further, in the same testamentary paper, he writes: "I have half a lac of rupees, more or less, with Messrs. Harrington, at Madras, which, as they have lowered the rate of interest, I have directed to be remitted to Messrs. Cotterill & Co., of Calcutta: this sum, if possible, I wish to allow to accumulate for eight or eleven years, when it will enable me, if * alive, to keep a carriage for my daughters; and if I * 52 die, it will make their portions so much the better."

The testator afterwards made another codicil, or testamentary paper, as a letter addressed to the said Patrick Anderson, containing (among other things) as follows: "After

fitting out the children for the voyage, paying your own and their passage to England, and procuring bills for their expenses for the two first years, besides paying the sums I have already mentioned, and those to be mentioned hereafter, be pleased to lodge the whole of my property at Bombay, when an opportunity occurs, in the company's next good loan." And he afterwards made another codicil, or testamentary paper, dated on board the *Candidate*, off Kedyree, the 21st July, 1804, and addressed the same as a letter to the said Patrick Anderson, containing (among other things), as follows: "I wish you to go home with the children, as you can endeavour to get on in the army at the same time. General Lake will hardly refuse you leave, when you tell him that the father of the children served his Majesty thirty years, and that they are deprived of the protection and instruction of a mother, depending solely on your and their relations at home." To which he added the following statement, and signed the same; that is to say, "Messrs. Forbes & Co., of Bombay, receive the interest, half yearly, of the three notes into which the opposite of 32,000 rupees was divided or opposed to the name of each child, at nine per cent per annum, until they can place it to more or equal advantage in the funds of the Honourable East India Company, and wish these sums to continue accumulating until each progressively shall amount to 8000*l.* sterling, the expenses of maintaining and educating these three children in the mean time to be defrayed by me, or at my

* 53 * expense. The reason why I have made this separate provision for these three children is, that they may be independent of me, in case I should be blockhead enough to marry at my time of life, and perhaps have more children; but in the event of my death without an increase of family, my will will show the manner in which whatever property I may die possessed of is to be distributed, including the opposite rupees, — 32,000, with its interest. I have paid for a cornetcy for Colin Anderson, Jr., in his Majesty's 19th regiment of Light Dragoons, on the 29th of September, 1802; of course, in case of my death, an equal amount of my property, with its interest from that day, will be credited to each

of the girls, and the remainder then equally divided amongst the four children, or the survivors of them, agreeably to the tenor of my will. C. ANDERSON, 30th Nov., 1803."—"1803, January 1st, lodged in the treasury at Bombay of the East India Company, 32,000 rupees, as a loan, at eight per cent, the interest payable at Bombay, half yearly, for the sole use and benefit of the under-mentioned children, and in the proportions set down opposite to their names:—

| | |
|--|---------|
| " Jane Jarvis Anderson | 13,600 |
| Ann Nesbitt Anderson | 10,245 |
| Caroline Erskine Anderson | 8,155 |
| | <hr/> |
| Bombay rupees | 32,000 |
| | <hr/> |
| Do. do. lodged in do. of do., 5,000 rupees, at the same rate, and payable in the same manner, for the support of the mother of these children; when she dies, the principal will revert to me or my heirs, &c. | 5,000 " |

* The testator died on the 28th day of July, 1804, * 54 at sea, while on a voyage from Calcutta to Bombay, without having revoked or altered his said will and codicils, leaving the four children before referred to, who were all illegitimate, him surviving, and all, except the eldest, were then resident at Bombay.

By letters-patent under the great seal of Great Britain, bearing date the 28th of February, in the 38th Geo. 3, being the charter for establishing the Courts of Recorder of Madras and Bombay in the East Indies, his Majesty was pleased to order and appoint that the Court of Recorder at Bombay should be a Court of ecclesiastical jurisdiction within Bombay and the limits thereof, and upon British subjects there residing, with the same powers, authorities, and privileges, and subject to the same restrictions as are thereinbefore given, granted, or mentioned unto or as to the Court of Recorder of Madras. And by the said charter it was, amongst other things, ordained and appointed that the Court of Recorder at Madras should be a Court of ecclesiastical jurisdiction, and should have full power and authority to administer and execute within Madras and the limits thereof, and towards

and upon British subjects there residing, the ecclesiastical law, as the same was then used and exercised in the diocese of London, so far as the circumstances and occasions of Madras and the people would admit or require. And for that purpose was given to the said Court full power and authority to grant probates, under the seal of the said Court of the said Recorder of Madras, of the last will and testament of all or any of the said British subjects dying and leaving personal effects within the said territories or districts respectively, and to demand, require, take, hear, examine, and allow, * 55 and, if occasion require, to disallow * and reject the account of them, in such manner and form as was then used, or might be used, in the said diocese of London, and to do all things needful and necessary in that behalf.

In conformity with the provisions of that charter, and orders and regulations of the said Court of Recorder of Bombay, the respondent, Sir Charles Forbes, the said Patrick Anderson, and the said Lachlan Macquarie, obtained probate of the said will and codicils from the Court of the Recorder of Bombay. And under the directions and authority of the said will and codicils, they possessed the said testator's house and land, and sold the same, and collected and got in all the testator's goods, chattels, and effects, and converted the principal part thereof into money; and they paid all his debts and legacies, and paid the annuities given by his said will as they became due; and the residue of the said testator's estate, which they so converted into money, was invested by them in the public funds, in manner hereinafter mentioned.

In the year 1805 Patrick Anderson proceeded to England with the three youngest children, and he took with him part of the said testator's assets; and on the 12th of November, 1811, the respondent, Sir Charles Forbes, on behalf of himself (Lachlan Macquarie having never intermeddled with the said testator's estate), and pursuant to the rules and regulations of the Recorder's Court of Bombay, rendered unto the recorder of the said Court an account of the administration of the said testator's estate and effects by the executors, and the same accounts were examined and passed, as approved of by the said Court: and previous to his (Sir Charles Forbes's)

departure from Bombay for England, which was in the month * of November, 1811, the balance appearing by * 56 the said account to be due to the testator's estate was remitted by him to Messrs. Parker & Co., in London, as the agents and bankers of the said executors, and they afterwards accounted for the same to the said Sir Charles Forbes, who with his co-executor, Patrick Anderson, having collected and administered the said testator's goods and effects as aforesaid, invested the residue, or a principal part of such residue, in bank three per cent annuities, in the joint names of the said Patrick Anderson, Lachlan Macquarie, and the respondent, Sir Charles Forbes. They never applied for or obtained probate to be granted of the said testator's will by the Prerogative Court of Canterbury.

Colin Anderson, the son, attained his age of twenty-one in the year 1809, and a separate account was kept with him of sums paid and expended on his account, but no distribution of the testator's residuary estate was made in the lifetime of the said son.

In the month of March, 1819, the testator's eldest daughter, Ann Nesbitt Anderson (she being then an infant), intermarried with the respondent, George Jackson, and they, in the month of May in the same year, filed their bill in the Court of Chancery in England, against the respondent, Sir Charles Forbes, the said Colin Anderson and Caroline Erskine Anderson, also against Lachlan Macquarie (who was then out of the jurisdiction of the Court), thereby stating the said will and codicils partly to the effect hereinbefore stated; and further stating that, since the death of the said testator, the said executors proved the said will and codicils, and took upon themselves the burden of the execution thereof in the East Indies; and erroneously stating that the respondent, Sir Charles Forbes, had duly proved the same in the * Prerogative Court of the Archbishop of Canter- * 57 bury, in England. (a) The bill further stated, that the said Jane Jarvis Anderson had since died an infant, and unmarried; that the expense of maintenance and education

(a) This statement in the bill was admitted on the argument to be an error.

of Ann Nesbitt Jackson and Caroline Erskine Anderson had been discharged by the said executors, and that they had purchased a commission for the said Colin Anderson, and that the residuary estate of the testator had been laid out in the purchase of stock, and that there was then standing in the names of the said executors 49,900*l.* bank three per cent annuities in the books of the bank, purchased by such residuary estate; that the said Patrick Anderson departed this life, and that Colin Anderson had some time since attained the age of twenty-one years, and that Caroline Erskine Anderson and Ann Nesbitt Jackson were still infants; and that, in March then last, a marriage was duly solemnized between the said George Jackson and Ann Nesbitt, and in consideration of such marriage, and for the purpose of making a settlement of the property of the said Ann Nesbitt Jackson, it being uncertain what was the extent and nature of the interest which she was entitled to under the said will and codicils, certain articles of agreement were entered into to the effect therein stated. The bill then prayed that the rights and interests of the respondent, George Jackson, and the said Ann Nesbitt Jackson, in her right, and of all parties, to and in the residuary estate of the said testator, might be ascertained and declared by the Court; and that the share and interest of Ann Nesbitt Jackson might be transferred into the names of the trustees of the said marriage articles, upon * 58 the trusts * thereof; and, if necessary, that accounts might be taken of the estate and effects of the said testator, and of his debts, legacies, and annuities; and that such residue, and the share of Ann Nesbitt Jackson thereof, might be ascertained, and an account taken of the interest and dividends of the share of the said Ann Nesbitt Jackson therein, which had accrued due, and that the same might be paid to the respondent, George Jackson, &c.

The defendants to the said bill (except Lachlan Macquarie, who was out of the jurisdiction), put in their answers thereto; and the respondent, Sir Charles Forbes, by his answer, admitted only that the said will and codicil were proved in the said Recorder's Court of Bombay, and that he and his co-executor, Patrick Anderson, had got in and received the

personal estate and effects of the said testator, and had remitted the same, together with the proceeds of his house and lands at Coolabah, which they had sold, to England; and that they had paid and discharged the testamentary expenses of the testator, and his debts, and legacies given by his will, and had kept down the annuities bequeathed thereby; and they admitted that the residuary estate of the said testator had been laid out in the purchase of stock in the public funds; and that there was then standing, in the names of the said Patrick Anderson (then deceased), Lachlan Macquarie, and Sir Charles Forbes, in the books of the Governor and Company of the Bank of England, 49,000*l.* bank three per cent annuities, which had been purchased with such residuary estate; and that there was in the hands of the said Sir Charles Forbes a balance of cash, and he said he was unable to determine the rights and interests of the plaintiff, Ann Nesbitt Jackson, and * the other persons interested * 59 under the will and codicils of the said testator, and he therefore claimed the directions of the Court in that respect, and he submitted to act as the Court should direct.

The cause came on to be heard before the Master of the Rolls, on the 25th of April, 1820, when his Honor ordered that it should be referred to the Master to take an account of the personal estate of the said testator, not specifically bequeathed, come to the hands of the said Sir Charles Forbes, or of any person or persons, by his order, or for his use; and also an account of the said testator's debts, funeral expenses, legacies, and annuities; and that the said testator's personal estate, not specifically bequeathed, should be applied in payment of his debts and funeral expenses, in a due course of administration, and then in payment of his legacies and annuities; and that the Master should ascertain the clear residue of the said testator's personal estate; and the usual directions were given for taking the said accounts.

After the aforesaid proceedings had been had in the cause, Caroline Erskine Anderson having, with the approbation of the Court, intermarried with the respondent, Thomas Falkner Middleton, they and the trustees of their marriage settlement, and the respondents, George Jackson Jackson and

John Anderson Jackson, the two children of the said George Jackson and Ann Nesbitt his wife, and also the said L. Macquarie, who had come within the jurisdiction, were all made defendants to the suit by supplemental bills, for the purpose of bringing the said several parties before the Court.

On the 25th of October, 1824, the Master, to whom the said original and several supplemental causes stood * 60 referred, made his general report therein, * whereby he found, among other things, that no creditor had come in to prove any debt, in pursuance of the advertisements in the London Gazette and other public papers for that purpose; and he found that the legacies of the said testator were all paid, and were included in the schedules to his report, and also certain annuities, all of which lapsed by the death of the annuitants, except an annuity of 720 rupees to Mrs. Mary Burchell, the mother of the testator's children, and who was resident at Bombay, for the term of her life; and an annuity of 50*l.* to Mary Thompson, a niece of the testator, resident in the county of Dublin, determinable on her death or marriage. And he found that the respondent, Sir Charles Forbes, and Patrick Anderson, by virtue of the said probate granted in India, collected and got in the testator's effects in India, and administered the same in India jointly, until the 14th of February, 1805, when the said Patrick Anderson proceeded with the said three female children of the testator for England. And that the said Sir Charles Forbes continued in India, and administered the estate and effects of the testator in India, and collected and got in such parts thereof as were not taken by the said Patrick Anderson with him to England. And that, on the 12th of November, 1811, pursuant to the rules and regulations of the Recorder's Court at Bombay, he rendered an account of the administration of the testator's estate and effects in India, which account commenced on the 1st of August, 1804, and ended on the 31st of August, 1811; and the Master adopted and allowed an official or notarial copy thereof, as an account of the administration of the testator's estate in India; and the balance of which, amounting to the sum of 2407*l.* 12*s.* 7*d.*, is accounted for as a

* 61 * receipt in England, on the 23d of January, 1813, and

as such is included in the first schedule to the said report under that date. And the Master further found that the said Sir Charles Forbes, jointly with the said Patrick Anderson, by themselves and their agents, between the 18th of December, 1809, and the 31st of December, 1818, received of the personal estate of the testator several sums of money, amounting together to the sum of 41,074*l.* 13*s.* 10*d.*, as appearing by the first schedule to his report, and against which he also found that they had made certain payments and disbursements, as appearing by the second schedule to his report; and that the said Sir Charles Forbes had, since the death of his said co-executor, by himself and his agents, received of the testator's personal estate several sums, appearing by the said first schedule to amount to the sum of 25,216*l.* 17*s.* 7*d.*, and had also paid and disbursed various sums, as by the said second schedule also appeared; and the said Sir Charles Forbes was allowed, in the said second schedule, a sum of 4000*l.*, set apart as a capital sum, bearing compound interest, in the hands of the said Sir Charles Forbes and his agents, for the purposes of securing the said annuities to the said Mary Thompson and Mary Burchell; and that the same, subject to such annuities, was subject to the general trusts of the testator's will; and that, with the said compound interest received, the same then amounted to the sum of 5018*l.* 12*s.* 10*d.*, as appeared by the said third schedule to the said report; and after referring to payments made in respect of the said annuities, as appearing by the fourth schedule to the report, and stating that the said Sir Charles Forbes had claimed to be allowed several sums paid for maintenance, education, and * advancement of the testator's children, but * 62 which the Master had not thought fit to allow, as not falling within the scope of the inquiries directed by the decree, the said Master certified that the clear residue of the said testator's personal estate then consisted of the sum of 36,000*l.* three per cent consols, standing in the name of the said Patrick Anderson, deceased, Lachlan Macquarie, deceased, and the respondent, Sir Charles Forbes; and of the sum of 30,683*l.* 0*s.* 5*d.*, then due from the said Sir Charles Forbes, subject nevertheless to the said two annuities.

The following legacies, 50*l.* to the said Patrick Anderson, 50*l.* to the said Sir Charles Forbes, 50*l.* to the said General Macquarie, 50*l.* to Alexander Anderson, and the value of a lieutenancy to Colin Anderson; viz., 564*l.* 2*s.*, are allowed as disbursements to the said Sir Charles Forbes; and the legacy duties on such legacies, and also on the value of annuities to the said Margaret Thompson, Archibald Anderson, Isabel Thompson, and Isabella M'Dougall, are also allowed as payments, by the said Master, on the second schedule to his said report, but nothing in respect of probate duty, and no other payments in respect of the legacy duty are claimed or allowed.

Colin Anderson (the son), having died intestate and illegitimate, his Majesty's Attorney-General was brought before the Court by supplemental bill, in respect of the interest of the said Colin Anderson in the said trust funds. Jane Jarvis Anderson (one of the daughters), having also died intestate and without issue, letters of administration to her and the said Colin Anderson, limited to the purposes of the suit, were granted to John Hopton Forbes. Ann Nesbitt Anderson, wife of the respondent, George Jackson, afterwards * 63 died, leaving several children; and a bill * of revivor and supplement was filed, to revive the suit, and to make her children and the said J. H. Forbes defendants.

On the 7th July, 1829, the respondent George Jackson, and Ann Nesbitt his wife, the respondent Thomas Falkner Middleton, and Caroline Erskine his wife, and the said respondents, George Jackson Jackson, John Anderson Jackson, and Jane Jackson, presented their petition to the Master of the Rolls, in all the said causes, praying payment of certain advances for maintenance of the said Ann Nesbitt Jackson and Caroline Erskine Middleton, out of their shares of the said trust funds, and for inquiries as to their subsequent maintenance, and also the maintenance of the children of the said Ann Nesbitt Jackson.

The said causes came on to be heard before the Master of the Rolls for further directions on the 17th of July, 1829; and the said petition and the said supplemental suit coming on to be heard at the same time, his Honor ordered that it should be referred to the Master to inquire and state to the Court

what sum ought to be set apart to answer the two several annuities of 50*l.* and 750 rupees, in his said report mentioned. And his Honor declared that, according to the true construction of the testator's will, the said Jane Jarvis Anderson, Ann Nesbitt Anderson, and Caroline Erskine Anderson, were in no event to take more than an interest for their respective lives; but that Colin Anderson, one of the residuary legatees, being a boy, was to take an absolute vested interest on attaining his age of twenty-one years; and that, while all the residuary legatees continued under age and unmarried, the residue of the testator's estate formed an aggregate fund, out of the interest whereof they were to be maintained and educated; and that * the surplus * 64 interest was to be invested, and added to the principal, for the benefit of the persons who should be eventually entitled thereto. And his Honor declared, that the said Colin Anderson, upon attaining his age of twenty-one years, became absolutely entitled to one-fourth part of the aggregate fund, and all subsequent interest and accumulations thereof, subject to a deduction of the sum paid for his cornetcy, with interest thereon from the time of the testator's death; and that the remainder of the aggregate fund continued until the death of the said Jane Jarvis Anderson to be one aggregate fund, out of the interest whereof the said Jane Jarvis Anderson and the two other residuary legatees were to be maintained and educated, and that the surplus interest thereof was to be invested, and added to the principal, for the benefit of the persons eventually entitled thereto; and upon the death of the said Jane Jarvis Anderson, under twenty-one and unmarried, Colin Anderson became further absolutely entitled to one-third part of the third share, in which she had a contingent life interest, in the said remaining aggregate fund; and his Honor declared that, upon the marriage of the said Ann Nesbitt Jackson, she became entitled for her life, for her separate use, to the interest of one moiety of the said then remaining aggregate fund; and on the marriage of Caroline Erskine Middleton she became entitled for her life, for her separate use, to the interest of the then remaining aggregate fund; and that, on the death of Ann

Nesbitt Jackson, the share of the residuary estate, to the interest whereof she became entitled for her life, became, under the trusts of the said will, divisible, in equal shares, among her surviving children and the legal representative of her deceased * children; and his Honor declared * 65 that the share and interest which vested as aforesaid in Colin Anderson, deceased, with the accumulations thereof, belonged to His Majesty, subject to the payment thereof of the costs and expenses incurred by the said John Hopton Forbes, in taking out letters of administration to the said Colin Anderson the younger, and Jane Jarvis Anderson, *ad litem*; and his Honor referred it back to the Master to make the necessary inquiries consequential on such declarations.

In pursuance of the last-mentioned order, the Master to whom the said causes stood referred made a separate report, bearing date the 1st day of December, 1829, and thereby (amongst other things), found that the effect of the said decree was to convert the one-fourth share of the said testator's residuary estate, which vested in the said late Colin Anderson, on his attaining twenty-one in October, 1809, to a third share thereof, on the death of the said Jane Jarvis Anderson, on the 19th day of April, 1812; and he certified, that it appeared by the account annexed to the examination of the said Sir Charles Forbes, therein referred to, and which accounts were adopted by his general report, dated the 23d October, 1824, and absolutely confirmed, that the aggregate of the funds, with the surplus and accumulated interest, which constituted the clear residue of the testator's estate, on the 31st day of December, 1822, the year in which the said Colin Anderson died, consisted of 36,000*l.* bank three per cent annuities, and of the sum of 23,974*l.* 14*s.* 1*d.* cash, in the hands of the said Sir Charles Forbes, subject, however, to the payment of the two annuities in the said report mentioned; and that the said late Colin Anderson was, at his death, entitled to one-third of the said 36,000*l.* bank * 66 annuities, * and one-third of the said sum of 23,974*l.* 14*s.* 1*d.*, together with the amount of dividends on both sums, but subject, nevertheless, to the deductions therein mentioned; and he further found that the sum then due to

his Majesty, as representing the said Colin Anderson the son, for his share of the said testator's estate, was the sum of 12,000*l.* three per cent consolidated annuities, being one-third of the said sum of 36,000*l.* like annuities, subject as therein mentioned.

By an order of the Court of Chancery, bearing date the 21st day of May, 1830, it was ordered (among other things), that 12,000*l.* bank three per cent annuities be carried over in trust in the cause of *Jackson v. Forbes*, to an account to be entitled "His Majesty's Account;" and that the costs of his Majesty's Attorney-General, of the said suits, were to be paid out of the said 12,000*l.*, when so carried over, but that was to be without prejudice to any question as to whether the residuary estate of the testator, Colin Anderson, was liable to legacy duty.

Subsequently to the said decree, Caroline Erskine Middleton died, having had two children, both of whom died in her lifetime, but administration to them was taken out by their father, the respondent, Thomas Falkner Middleton, and he filed a bill, claiming to be entitled to the share of his said wife, in the said testator's residuary estate.

The Attorney-General, in October, 1830, presented a petition in these causes, praying that it might be declared, that his Majesty is entitled to be paid the amount of the probate duty and of the legacy duty upon the whole of the testator's estate and effects which were brought or remitted to England, or administered or remaining to be administered in

* England; and that probate of the will and codicil * 67 of the testator ought to have been taken out from the Prerogative Court of Canterbury upon the same estate and effects, and praying the necessary directions for the raising and paying the amount due to his Majesty, in respect of the said probate duty and legacy duty. The respondents, at the same time, presented a cross petition, praying that the Attorney-General's petition might be dismissed, and that it might be declared that the executors were not required by law to have obtained probate in this country, and that the testator's estate was not liable to such probate duty; and that the residuary estate of the testator, collected and alleged to have

been appropriated in the East Indies, was not liable to the legacy duty.

The two petitions came before the Lord Chancellor in 1831, when his Lordship ordered a case for the opinion of the Court of Exchequer, and that the questions should be: First, Whether the said Sir Charles Forbes and his co-executors were not bound to have taken out probate from the Prerogative Court of the Archbishop of Canterbury, to the testator's will and codicils, before they could legally do all, or any, and which of the acts hereinbefore stated. Second, Whether the said Sir Charles Forbes and his co-executors were not, and whether the said Sir Charles Forbes, as the survivor, was not, bound to take probate from the Prerogative Court of Canterbury, and to pay a probate duty upon the whole, or any, and what part of the testator's property collected in India, and brought or transmitted to England. Third, Whether the duties chargeable upon legacies, annuities, and shares of residue, under the Acts of Parliament in force touching such duties upon testators' estates administered in England,

* 68 were and are * chargeable in respect of all, or any, and which, of the legacies, annuities, and shares of the residue respectively bequeathed by the testator's will and codicils.

The Attorney-General and the respondents' counsel, in pursuance of the said order, agreed upon a case, in which were submitted the said several questions; and in which were stated all facts necessary to bring the matter in question before the Court of Exchequer, and the facts therein stated were the same and to the same tenor as the same are hereinbefore stated. The case was argued in Easter term, 1832, and upon the argument the counsel for his Majesty waived the subject-matter involved in the two first questions; and in respect of the third question, the Barons of the said Court certified to the Lord Chancellor that they were of opinion, that the duties chargeable upon legacies, annuities, and shares of residue, under the Acts of Parliament in force touching such duties, were not chargeable in respect of any of the legacies, annuities, and shares of residue, bequeathed by the testator's will. (a)

(a) See *Jackson v. Forbes*, 2 Cro. & J. 382, and 2 Tyrw. 354.

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Upon a petition afterwards presented to the Lord Chancellor by the respondents, praying (among other things) for a confirmation of the said certificate, his Lordship, by an order bearing date the 18th day of July, 1832, ordered that the petition of his Majesty's Attorney-General be dismissed, and declared that the legacies, annuities, and residuary personal estate of the testator were not liable to duty chargeable upon legacies, annuities, and shares of residue, under the Acts of Parliament then in force touching testators' estates got in and distributed under probates of wills granted by the ecclesiastical Courts of this country.

From that order his Majesty's Attorney-General * appealed to this House, abandoning here, as he did in * 69 the Courts below, the claim in respect of the probate duty.

The Solicitor-General (Sir C. C. PEPPYS), and *Mr. Wray*, for the Crown. — The proposition for which the Crown contends is, that wherever a British subject dies, the legacy duty attaches on legacies and shares of his personal estate administered in this country; we confine the rule to British subjects, because it has been lately decided that it does not apply to the subjects of other States. *In re Bruce.* (a) The question here is, whether the residue of this testator's estate was brought to this country to be administered, or, being administered in India, was remitted here for payment only? If it was brought here to be administered, there cannot be a doubt that it was liable to the legacy duty. Sir Charles Forbes remained in India after the departure of his co-executor, to realize the fund, and he then sent it home for the purpose of being administered here in the ordinary course. His answer to the bill in Chancery, the decree pronounced in the cause, and the Master's report in pursuance of that decree, cannot be in any way distinguished from the ordinary proceedings in an administration suit. No payment or appropriation of the legacies had been made before the institution of the suit. Some of the money had been invested in the funds, in the names of the executors, some had remained in the hands of

(a) 2 Cro. & J. 436-451; S. C., 2 Tyrw. 475.

the acting executor, and he was called upon by the bill to administer in due course the assets of the testator.

By the true construction of the 36 Geo. 3, c. 52, this * 70 fund comes within its operation. By the second * section, every legacy specific or pecuniary above 20*l.*, and the clear residue and every part thereof, is made subject to the duty imposed by that Act. The language of the fifth, sixth, and seventh sections is equally general, and applicable to every executor taking on himself the burden of the execution of a will or administration of an estate in this country. The fifth provides the form of receipts, which it shall be lawful for any of his Majesty's subjects to fill up. The sixth requires the duty to be paid by the executor or administrator taking the burden of the execution of the will. The seventh defines what shall be considered a legacy within the meaning of the Act, which is, in very general terms, limited neither to the place of the party's death, nor to the place where the estate is found, but applying to any person dying after the passing of that Act.

[THE LORD CHANCELLOR. — Suppose a Frenchman came from Normandy to Hampshire, with a sum of money bequeathed by a testator in France to a legatee in Hampshire, and said, "Here is your legacy of 1000*l.*, give me a receipt;" would his Majesty's Attorney-General have a right to interfere?]

A foreigner is not within the Act. The fifth section has the words, "any of his Majesty's subjects." There is no clause in the Act applying to foreigners, and the construction put upon it is, that they are not included. The principal sections bearing on this case, are the 27th, 28th, 32d, and 33d, besides those which have been already referred to.

[THE LORD CHANCELLOR. — According to your argument, if a foreigner resides in this country his estate is liable to the duty.]

Yes. That is decided. *In re Ewing*, (a) but that question

(a) 1 Cro. & J. 151; S. C., 1 Tyrw. 91.

does not occur here. The respondents cannot find any one * expression in this Act exempting them from payment of this duty. It does not signify in what part of the world the property lies; if it be administered here, the duty attaches. * 71

[THE LORD CHANCELLOR. — By your argument, it depends on the executor whether the duty attaches or not; if he choose to remain abroad, and send the money to the legatee here, the legacy is free from duty; but if he come here to pay it, then you say it is not free, because if the executor come and remain here, he is within the jurisdiction of this House or of Chancery.]

There are some lately decided cases in which this question arose. The *Attorney-General v. Cockerell* (a) is a case in all its circumstances like the present, except that the surviving executor took out probate in this country after the death of the co-executor, who took out probate in Bengal and brought the fund home with him. The testator there was a British subject resident in the East Indies, realizing his property there, making his will there, and dying there. The executors were in India at the time of his death, and the will was proved there; yet it was held that the legacies bequeathed by that will to persons in England, and paid to such persons here, were liable to this duty, if any thing remained to be done in the way of administration here. That case, of the authority of which not a doubt has been entertained from the year 1814 to this time, must be held overruled if the decision of the Courts of Exchequer and Chancery in the present case be correct. Another of the cases which come nearest to the circumstances of the present, is that of the *Attorney-General v. Beatson*. (b) The testator there was also a native of Scotland, had been domiciled in Madras, where he made his will, and * died at sea in a voyage to London, * 72 leaving his will at Madras, where administration was granted with the will annexed. His assets were got in there, and his debts paid and legacies to such legatees as resided

(a) 1 Price, 161.

(b) 7 Price, 560.

there, and the balance was remitted to the attorneys here of a residuary legatee in Scotland, who took out letters of administration with the will annexed in England. The legacy duty was held to attach upon the property remitted from India, although it was only *in transitu* to Scotland. The next case in point, is that of *Logan v. Fairlie*. (a) The testator there resided in India, had all his property there, and died there, leaving a will, by which he bequeathed his residuary estate to legatees in Scotland. The executor also resided in India, proved the will there, and remitted the residue to his agent in England, with directions to pay it to the legatees. In a suit instituted in Chancery in England in respect of the residue, it was held that it was liable to the legacy duty. That case also, and all the cases decided on this subject since 1814, must be founded in error if the decision of the Courts below in the present case be affirmed. The true criterion is this: if the property is in a state in which you cannot hand it over to the legatee, then it is not yet administered; if the legacy remains to be severed from the general estate, as in the case of *Logan v. Fairlie*, or if any question as to the rights of the legatees in the estate or residue thereof remains to be decided and declared, as in the present case; in all these cases the legacies become liable to the payment of the duty to the Crown. Another case applicable to the question before your Lordships, is that *In re Ewing*, (b) which was the last argued by one of your

* 73 * Lordships when at the bar. A testator domiciled in England died here, possessed of property in American, Austrian, French, and Russian stock; his debts were paid by his executor out of his personal property in this country, and the stock was transferred into the name of the executor, who remitted the dividends to the legatees. It was held that although the funds were transferable to parties abroad, and the dividends on them payable in the foreign countries, yet the legacies were liable to the duty. There is another case, the last decided on this subject, which is conceived by the respondents to be an authority for them. It is the case *In re*

(a) 2 Sim. & Stu. 284.

(b) 1 Cro. & J. 151.

Bruce. (a) The testator was an American and died in America, having bequeathed his property in this country to English legatees, and appointed an English executor resident in England. It was held that the property in this country was not liable to the legacy duty, on the ground that he was not a British subject, and his property was not liable any more than himself to be bound by the statutes of this realm; and these circumstances distinguish that case from the cases already cited.

When the case now before your Lordships came before the Court of Exchequer, there was an uniform rule, that property like this was not exempt from the legacy duty. During the argument there, Lord LYNTHURST and Mr. Baron BAYLEY put to the counsel several supposed cases, (b) which certainly could not be controverted, if such cases arose. They seemed to think that the institution of the suit in Chancery made no difference in the case. If this estate had *been, * 74 as they supposed, administered in India, the proceedings in Chancery here were erroneous from the commencement.

[THE LORD CHANCELLOR. — How would this claim stand before the institution of the Recorder's Ecclesiastical Court in India?]

The question is not in the least affected by the establishment of that Court; that is a Court for probate only. The property, after being collected by the executors there, was remitted to this country for the purpose of being administered here, and a suit was accordingly instituted for that purpose. If an executor in India assents to the legacy there, and then remits it to his agent here, or to the legatee himself, the duty does not attach on that legacy, because it is appropriated; but if sent here for the purpose of ascertaining the right of the legatee, it is subject to the duty. It is clear that there was an administration of this estate in this country from 1811 to 1818. The property was brought to this coun-

(a) 2 Cro. & J. 436-451; S. C., 2 Tyrw. 475.

(b) See *Jackson v. Forbes*, 2 Cro. & J. 401; S. C., 2 Tyrw. 364-372.

try, the children were brought and domiciled in this country, and the legacies were payable in this country.

THE LORD CHANCELLOR. — It is very much to be regretted that the Judges give no reasons in their certificate for the conclusion to which they come on a case sent for their opinion. The reason assigned for not giving such reasons is, that the learned Judges may have afterwards to give their reasons in this House; but so may they in every decision given in the Courts of King's Bench, Common Pleas, and Exchequer.

Sir Charles Wetherell, and *Mr. Garratt*, for the respondents. — This case had been elaborately argued in the *75 Court of Exchequer, and the certificate of the * opinion of the Judges of that Court was signed by Lord LYNDEHURST, C. B., BARONS BAYLEY, VAUGHAN, and BOLLAND (all the Barons who heard the argument), and it was adopted by the Lord Chancellor. It would be professionally more satisfactory if the certificate contained the reasons of the judgment of the Court, but its authority is not less cogent notwithstanding the absence of them. If this decision should appear to be irreconcilable with former cases in similar circumstances, be it remembered that it is the judgment of the Court of Exchequer overruling its own decisions, or rather reviewing them and settling the law on the subject. But your Lordships will find, on examining the former decisions, that you do not overrule them by adopting this certificate and affirming the decree of the Court of Chancery. First, however, it is proper to draw your Lordships' attention to the statute on which this question arises.

The collection of the legacy duties was loose and irregular prior to the passing of the 36th Geo. 3, c. 52. Would the framers of that Act, which was intended to provide for every case of legacy duty, have omitted a clause expressly applying to a testator's estate in India, if such an estate were intended to be subject to this duty? The express provisions of that Act show that the legislature had no such intention. By the fourth section, the Commissioners of Stamps are to appoint persons in "the several counties of Great Britain" to collect this

duty. Can those commissioners appoint, under that section, persons in Bombay and Madras to collect the duties in those places? By the fifth section, the commissioners are required to have a supply of printed receipts, according to the form in the schedule annexed to the Act. These receipts are printed in the neighbourhood of Lincoln's Inn, * and * 76 a quantity of them is kept at the Legacy-duty office in Somerset House, and in the offices of the collectors. Is a Bombay executor to come or send here for these receipts? By the sixth section, the executors are required to pay the duties for which those printed receipts must be taken, stamped according to the Act. Can this stamp be affixed to receipts in India? The answers to these questions are obvious. What has been said of these sections is applicable to the 23d, 27th, and 28th sections, which more strongly define the locality of the property to which the Act is applicable. There are Acts (a) requiring copies of wills in Wales to be sent up by the registrars of the local ecclesiastical Courts, for the purpose of better collecting the duties; but there is not a word in any Act, nor in the charter constituting the Probate Courts of Bombay and Madras, requiring copies of wills or probates to be transmitted thence to this country. By that charter, "His Majesty granted and appointed that the Court of Recorder at Bombay should be a Court of ecclesiastical jurisdiction within Bombay and the limits thereof, and upon British subjects there residing, with the same powers, authorities, and privileges; and subject to the same restrictions, as are thereinbefore given unto the Court of Recorder at Madras; and that the Court of Recorder of Madras should be a Court of ecclesiastical jurisdiction, and should have full power to administer within Madras and the limits thereof, and towards British subjects there residing, the ecclesiastical law, as the same was then exercised in the diocese of London, so far as the circumstances and occasions of Madras and the * people would admit or * 77 require; and for that purpose was given to the said Court full power and authority to grant probates, under the

(a) See 42 Geo. 3, c. 99; 44 Geo. 3, c. 98; 48 Geo. 3, c. 140, and 55 Geo. 3, c. 184.

seal of the said Court of the Recorder of Madras, of the last will and testament of all or any of the said British subjects dying and leaving personal effects within the said territories respectively, and to demand, require, take, hear, examine, and allow, and, if occasion required, to disallow and reject the account of them, in such manner and form as were then used or might be used in the said diocese of London, and to do all things needful and necessary in that behalf."

THE LORD CHANCELLOR. — Suppose a testator dying in India and his executor residing there, the legatee obtains probate for the purposes of a suit in this country, and takes it with him to India: can that probate operate on the estate in India? We know probates obtained here are sent to France and other States, and effect is given to them.

Mr. Wray. — A probate taken out here would not operate on an estate in India, where there is an Indian administration.

The counsel for the respondents. — With respect to the cases cited, this case is distinguishable from all of them. And the first distinction is between an estate administered wholly or partially here, and one administered wholly in India. By the proceedings on behalf of the Crown, it is in effect admitted that this estate was administered in India. Why otherwise is the claim for the probate duty abandoned?

The reason alleged is that the property, being within *78 the limits of the Probate Court in *India, cannot be subject to probate here; but if the property was local for one purpose, it is so for another, and is no more liable to legacy duty than to probate duty. In the case of the *Attorney-General v. Cockerell* the will was proved in the ecclesiastical Court in England, and that fact alone, independent of other circumstances, distinguished that from the present case; although, with great respect for the learned Judges who decided that, it is not easy to understand how the obtaining of probate here, the property being in India, can confer an English locality on that property. If one executor

here is obliged to file a bill in Chancery for the purpose of obtaining the property from the representatives of the other, who proved the will in India, we cannot understand how such an act can change the locality of the property and constitute an administration in England. But whether the judgment in that case be right or not upon the ground stated, there is nothing of the sort in this case. The same distinction is found between the present case and that of the *Attorney-General v. Beatson*, to which the same observations are applicable. The Master of the Rolls followed the decisions in those two cases in his judgment in *Logan v. Fairlie*. But in that judgment his Honor says, (a) "Where a testator dies in India, leaving personal estate there only, and his executors reside and prove the will there, no duty is payable on the legacy remitted to a legatee in this country." These words describe accurately the position of the estate in the present case.

[THE LORD CHANCELLOR. — Mr. Solicitor-General, you agree that if the legacy be paid in India, it is not chargeable with the duty. Now, if the executor in India give the legatee in India his draft for the amount of the legacy on his (the executor's) agent in London, and the legatee coming to London, goes to a bank here to get the draft discounted, would the legacy duty attach in that case? * 79

THE SOLICITOR-GENERAL. — The affirmative answer to that is the judgment in the case of *Logan v. Fairlie*.

THE LORD CHANCELLOR. — So, if the executor pay by draft, it is under one law; if by money, it is under another law.

THE SOLICITOR-GENERAL. — Always regarding the payment of it in England. There is no doubt, that if to administer the estate you must resort to the ecclesiastical Court here, that makes it English property; or if the property must be brought here to be administered under a decree of the Court of Chancery, and it is paid into the name of the Accountant-

(a) 2 Sim. & Stu. 291.

General in the mean time, that makes it English property as much as if it had been vested in the English funds.]

In all the cases in which it was decided that the legacy duty attached, there were probates or some administration in this country. But it is alleged that in this case also probate ought to have been obtained in the ecclesiastical Court in England. There was no reason for obtaining probate here, and probate cannot be granted except where the property lies within the diocese. *Daniel v. Luker*, (a) *Yockney v. Foyster*, cited in the case of *Scarth v. The Bishop of London* (b). All these cases show that the Court of Chancery has jurisdiction to entertain a suit in respect of a testator's estate without probate or letters of administration. Can it make any difference in this case whether the legacy is paid by the executor directly, or through the medium * of the Court of Chancery? Can the Court, by taking possession of the property, alter the situation of the parties, and subject the property to the legacy duty? This is not a suit seeking for the administration of the estate of the testator.

The Solicitor-General replied.—The right of the Crown to the legacy duty cannot be affected by the parties not applying for probate in England. No English probate was taken out in the case of *Logan v. Fairlie*, and yet it was there held that the estate was chargeable with the legacy duty.

THE LORD CHANCELLOR.—The question, my Lords, is whether the Crown is entitled to the legacy duty on the legacies and shares of residue bequeathed by the testator in the cause. On that question coming before me incidentally in the Court of Chancery, I thought it proper, with the consent of the parties, to send it to a Court of Law. As it was a question of construction of an Act of Parliament, and having not a particle of equity in it, I thought it was not fit for the Court of Equity to decide it. If it was proper that it should be sent to a Court of Law, then the Court of Exchequer, which is concerned with his Majesty's revenue,

(a) 3 Dyer, 305.

(b) 1 Hagg. 631.

was the proper Court for the construction of a Revenue Act. The case was sent therefore to the Court of Exchequer; and that Court deciding against the Crown, came to the opinion which it certified to the Court of Chancery, without stating the reasons on which the decision was founded. Such is the custom; a custom, the grounds of which I do not see, the continuance of which I do not understand, which has long been the subject of disapprobation, and has given much discontent, * and which, I hope, will soon cease. * 81 But that certificate stated that the duty did not attach on this property. The decision, it is said, is not reconcilable with the decisions of the same Court in the cases of the *Attorney-General v. Cockerell*, and the *Attorney-General v. Beatson*; but I find it as difficult to reconcile these previous decisions with the Act of Parliament, as to reconcile this with them. On that account, I recommend to your Lordships not to decide this until your Lordships will have time to look into those previous cases. They were cited in the argument in the Court of Exchequer, and the discrepancies were then pointed out to that Court. It was not therefore from overlooking these cases, but on full consideration of them, that the decision contained in this certificate is founded. When the case came before me again, on the certificate of that Court, I do not recollect if the case was argued before me. I rather think I agreed with the Judges of the Court of Exchequer, without argument, my impression was that it would require great consideration from me, sitting in the Court of Chancery on a case concerning the revenue, coming from the Court of Exchequer,¹ which is the proper Court for questions concerning the King's revenue, before I could determine to follow a course different from that Court. This decision of mine is now brought under your Lordships' review. I have no bias in my mind, nor partiality to the decision, nor any motive to induce me to adhere to it, if I thought it was not well founded. I would urge your Lordships to give the case your careful consideration before you

¹ The equity powers of the Court of Exchequer have been transferred to the Court of Chancery. 1 Dan. Ch. Pr. (4th Am. ed.) 6.

say that a decision on a question of revenue coming from a Court of revenue is wrong.

* 82 Lord PLUNKET concurred in the postponement of * the case for further consideration. The principle on which the claim of the Crown to the duty was put was, in substance, this: That whenever the property of a British subject dying in a foreign country is brought to England for distribution amongst the legatees, it becomes chargeable with the legacy duty. It would require much consideration of the circumstances of the cases cited to determine whether they did or did not support that principle.

June 9.

THE LORD CHANCELLOR. — I said, when this case was argued, that it would require your Lordships to have a strong opinion on it, before you could come to a decision contrary to the deliberate judgment of the highest Court of revenue in the kingdom, upon a question of revenue. That I was perfectly satisfied with that judgment, and that the case was free from doubt, I will not take on myself to say, ignorant as I was of the reasons upon which it was founded, and seeing that it appeared to differ in some respects from the decisions of the same Court in one or two former cases. I have since considered those cases; and the Lord Chancellor of Ireland, whose valuable assistance I had here when the case was argued, has since sent me his opinion in writing, which coincides with my own, — that the cases of the *Attorney-General v. Cockerell*, and the *Attorney-General v. Beatson*, are distinguishable from the present; and that, as in neither of those cases do the facts completely agree with those of the present case, there is not in reality any conflict among the decisions. In the *Attorney-General v. Cockerell*, the will was proved in the Prerogative Court of Canterbury by the defendant, who assumed the character and duty of the * 83 executor of the will of Robertson, the * testator in that case, and subsequently got in part of the testator's estate. In the *Attorney-General v. Beatson* also, the will was proved by the defendant in England. In *re Ewin* like-

[66]

wise, the will was proved in England, and the only point decided in it was that assets in a foreign country, of a testator domiciled and dying here, were liable to the legacy duty. In the case of *Logan v. Fairlie* the residuary estate of the testator was found in England in the course of administration; and before any specific appropriation of it was made, it was held that it was liable to the legacy duty. My noble and learned friend has, in his judgment communicated to me, taken these distinguishing circumstances of all these cases into his consideration. In affirming the judgment of the Courts below in the present case, your Lordships do not overrule any of the former cases: they stand on different grounds, each resting on its peculiar circumstances. I therefore move your Lordships to affirm this judgment.

The judgment was accordingly affirmed.

* APPEAL.

* 84

FROM THE EQUITY EXCHEQUER.

ATTORNEY-GENERAL v. HOPE AND OTHERS.

1834.

HIS MAJESTY'S ATTORNEY-GENERAL . . . *Appellant*.
 WILLIAM HOPE, JAMES WOOD, AND JAMES }
 BRIERLY } *Respondents*.¹

Probate Duty.

Where a testator dies in this country possessed of personal property here and also in foreign funds, and the executor takes out probate here and pays probate duty on the amount of the property in this country, he is not chargeable with the probate duty in respect of the property in the foreign funds, although he afterwards obtain such property and administer it.*

¹ S. C., 8 Bligh N. S. 44.

* See *Attorney-General v. Forbes*, *ante*, 48, note 1; 1 Jarman Wills (3d Eng. ed.), 2, note (f); *Thompson v. The Advocate-General*, 12 Cl. & Fin. 1 and notes.

August.

JOHN MARSHALL, late of Ardwick, near Manchester, in the county palatine of Lancaster, was for many years previous to, and at the time of his death, resident and domiciled in England, at Ardwick aforesaid, and had no other place of residence or domicile. John Marshall was a merchant trading with North America, and at the time of his death was possessed of personal estate and effects, amounting together to 300,000*l.* and upwards, part of which personal estate and effects, was at the time of his death, situate in this country, or on the high seas, and the residue thereof was, at the time of his death, situate in North America, and consisted partly of goods and effects belonging to him, and which had been sent by him to North America for sale, and were then remaining in the hands of his agents and unsold at New York and
 * 85 elsewhere in North America; and partly of book * debts and other simple contract debts due and owing to him from divers persons at the time of his death, domiciled and resident in North America; and partly of moneys in the public funds or stocks of the United States of North America, and in the funds or stock of the State of New York, in North America, standing partly in the name of the said John Marshall and partly in the name of his agent there.

The said John Marshall duly made and published his last will in writing, with a codicil thereto, bearing date respectively the 22d day of August, 1823, and the 15th day of May, 1824, and he appointed the respondents executors. He died on the 19th day of July, 1824; and the executors, on the 28th day of September, 1824, obtained probate of the will and codicil in the proper ecclesiastical Court in this country, for the purpose of administering the whole of the testator's personal estate, or so much thereof as required probate for the purpose of being administered by them, and they paid for duty on such probate the sum of 675*l.* The duty so paid was in respect only of such part of the testator's personal estate as was at the time of his death situate in this country or upon the high seas, and which was under the value of 50,000*l.*; and the said executors have never applied for or obtained probate to be granted by any other court or juris-

diction, and have never applied for or obtained any other probate than the probate hereinbefore mentioned.

The executors have collected and administered in this country the whole or the principal part of the personal estate of the testator, whether situate in this country or elsewhere, at the time of his death, to the amount of 300,000*l.* and upwards.

All the executors at the time of the testator's death, * and at the time when they took out and obtained * 86 probate, were and have continued to be resident and domiciled in this country.

On the 9th March, 1832, His Majesty's Attorney-General filed an information, which was afterwards duly amended, on the equity side of the Exchequer, against the respondents, stating these facts, and praying that it might be declared, that a debt arose and became payable to his Majesty in respect of probate duty upon the whole amount of the personal estate and effects of the testator, including as well the personal estate and effects of the said testator which, at his death, were situate in this country or upon the high seas, as the personal estate and effects which were then in America.

The respondents appeared, and on the 21st of May, 1833, they filed a general demurrer to the information.

The demurrer was set down for argument in Trinity term, 1833, and judgment was given for the respondents.

The Attorney-General (Sir J. CAMPBELL) and Sir G. GREY, for the Crown. — The information alleges that it was by virtue of this probate that the money here was obtained. This allegation cannot be denied by the respondents. The property was obtained under the probate, or in consequence of the probate, and therefore it was obtained by virtue of or in respect of the probate. The other side, by demurring, must be taken to confess the fact. If this probate had not been taken out till all this money had been paid, could it be said, because it did not happen to be actually within the diocese at the time of the death of the testator, that the probate duty need not be * paid? The principle laid down in * 87

respect, but in this instance especially, as this is a question peculiarly within its jurisdiction. On this ground, though I have besides but little doubt in my own mind, I should certainly require something very strong to make me differ from the decision of that Court. I shall take time to consider the arguments, to examine the statutes, and further, to make inquiry among the heads of the ecclesiastical Courts as to some matters introduced into the arguments. In the Court below, the Chief Baron said that the whole question was, whether the probate was granted in respect of the 300,000*l.*; that if it was, the duty was payable; if it was not, then the duty was not payable. The Attorney-General admitted that construction of the Act, but said that the demurrer confessing the fact, it must be taken that it was in respect of this probate that the effects were obtained by the party, and therefore it follows that it was granted in respect of this foreign fund. I confess that I cannot go along with that argument, although it is possible that the probate granted here may have been used for that purpose elsewhere. But it is not because the executor did get in the American estate, that it can be

* 90 said he got * it in respect of this probate. If I could be satisfied that at any time the ecclesiastical Court so far acted with respect to property out of the jurisdiction as to draw that property over to its jurisdiction, and to get not only the property here but to extend its gripe over foreign property, or to grasp that property when it came here, that would at once displace the argument of the respondents. I shall inquire into that matter, but I take it that the ecclesiastical Court would reject any such jurisdiction.

August 12.

THE LORD CHANCELLOR. — The case to which I shall now call your Lordships' attention to-day is one which is an appeal from the decision of the Court of Exchequer, from the unanimous judgment of the Judges of that Court, upon an information filed by the Attorney-General for the purpose of obtaining payment of probate duty upon certain property belonging to the testator at the time of his decease, and charged to be under the jurisdiction of the Court. When the case was argued,

I entered at some length into the reasons which I had for not agreeing in the principal argument of the Attorney-General. I did not think that the use made of a probate was a test sufficient to denote the purpose for which it was granted. The words of the Act refer not to the use eventually made, but distinctly to the purpose for which the probate was granted, and which was in contemplation when it was granted. The question therefore is, as to the words of the Stamp Duties' Act, and to the schedule to it relating to this matter; and with reference to these, it does not appear to me that the probate was made available in collecting the foreign funds, so as to bring this case within the Stamp Duties' Act. It appears to me, on the other hand, that much must * depend upon * 91 the course and practice of the ecclesiastical Courts as to granting probates. If they deal with the property before it is brought to this country so as to hold it within their reach, then it is said that the probate relates back to the property; that is, the probate duty attaches, for that the probate is granted in respect of property at the time within the jurisdiction. If that be so, then *cadet questio*, for undoubtedly the stamp duties would attach. If, on the other hand, the probate was merely granted in respect of the personalty at the time of the decease, then arises the question, whether the case comes within the words of the schedule, and consequently whether the probate duty attaches? It was maintained in the argument when the case was before the House, and seemingly upon sound principles, that probate was given by the ordinary and taken in respect of an ancient practice in popish times, and in respect of the interest which the ordinary had in the personalty of the individuals to be applied to pious uses for the safety of their souls. This was the origin of the probates giving an interest in the personalty to the ecclesiastical Courts. The pious uses afforded them an interest, and many masses were no doubt said, and the money was taken possession of by the ecclesiastics themselves for their own use, they doubtlessly considering this as applying it to pious uses. With that we have now nothing to do; but hence arose the practice of admitting executors to prove the will, and of granting letters of administration in cases where there was no will. Thus arose at the

outset the claims of the ordinary, which afterwards became vested in other parties. If the ordinary only claimed, and he never did claim any thing beyond the goods within his own jurisdiction, if he never claimed for foreign goods, the argument falls to the ground, for it appears that probate

* 92 * was never granted except for goods within the jurisdiction ; and if so the right to this probate duty did not attach in the present case.

I have made inquiries of very learned parties, two very competent authorities, one the learned Judge of the Prerogative Court, and the other the King's Advocate, and they both confirm the view I take of the jurisdiction and of the nature of the ordinary's office. This of itself would be a strong ground for affirming the decision of the Court below ; but I am also supported in doing so by an argument in the case of the *Attorney-General v. Forbes*, (a) which was lately before your Lordships, and in which I was assisted by the Lord Chancellor of Ireland ; I there used the same argument, and that noble and learned Lord fully concurred with me, that unless there was a clear miscarriage in the Court below, it would not be advisable to shake the decision of the Court of Exchequer upon such a question as this ; a decision pronounced after great deliberation and argument upon a revenue case, a kind of case more especially belonging to that Court. I am sufficiently confirmed in my opinion therefore, though the case may not be quite clear, and though there are two conflicting decisions upon this subject. But these are not so much decisions as *obiter dicta* obtained from the Judges in a way which I cannot explain. That appeared so in the case of *In re Ewin*, (b) the last which I argued at the bar of the Court of Exchequer. I think that there is no case made out to shake the decision of the Court below. I am satisfied therefore, and I move your Lordships, that the judgment of the Court below be affirmed, but without costs.

Judgment affirmed accordingly.

(a) *Vide supra*, pp. 48, 81, 82.

(b) 1 Tyrw. 92; 1 Cr. & Jer. 151.

* WRIT OF ERROR.

* 93

FROM THE EXCHEQUER CHAMBER.

SOLARTE AND OTHERS v. PALMER AND ANOTHER.

1894.

JOSE VENTURA DE AGUIRRE SOLARTE and two
 others, Assignees of JOAQUIM RUEZ DE AL- } *Plaintiffs.*
 ZEDO, a Bankrupt }
 JOHN ARCHDALE PALMER and WILLIAM BOUCH *Defendants.*

Bill of Exchange. Notice of Dishonour.

A letter from the holders of a bill of exchange to an indorser liable upon the bill, threatening legal proceedings if the bill is not paid, is no notice to such indorser of the dishonour of the bill.¹

June.

THIS was a writ of error brought by the plaintiffs below upon a judgment of the Exchequer Chamber, affirming a judgment in the Court of King's Bench in favour of the defendants below.

The action was brought by the plaintiffs, as assignees of Joaquim Ruez de Alzedo, a bankrupt, against the defendants, as indorsers of a bill of exchange.

The declaration contained a special count, which stated in the usual manner that the bill had been drawn on Daniel, Jones, & Co., that they accepted it, payable at Messrs. Williams, Burgess, & Co.; and then averred that the said bill was duly presented at the said Messrs. Williams, Burgess, & Williams, for payment thereof, and payment required, but that neither the said Messrs. Daniel, Jones, & Co., nor the said Messrs. Williams, Burgess, & Williams, would pay the same, but refused so to do.

There was a second count on a bill of exchange omitting the acceptance at and the presentment to * Messrs. * 94 Williams, Burgess, & Williams. The defendants pleaded the general issue. The cause came on for trial at the London

¹ See Story Prom. Notes (6th ed.), § 348 *et seq.*; 3 Kent, 108.

sittings after Hilary term, 1828, before Lord TENTERDEN, when it was proved that the bill was duly presented for payment at Messrs. Williams, Burgess, & Williams, on the 15th of December, the day on which it became due, that payment was refused, that the bill was returned to the plaintiffs for non-payment on the 16th day of December, and that the plaintiffs, on the 17th day of December, caused to be written, by Messrs. I. & S. Pearce, the attorneys for the plaintiffs, the following letter to the defendants:—

“17th December, 1825.

“Gentlemen,—A bill for 688*l.*, drawn by Mr. Joseph Keats upon Messrs. Daniel, Jones, & Co., and bearing your indorsement, has been put into our hands by the assignees of Mr. J. R. de Alzedo, with directions to take legal measures for the recovery thereof, unless immediately paid to,—Gentlemen, your very obedient servants, I. & S. PEARCE.”

Addressed, “Messrs. Palmer & Bouch.”

Which letter was, on the 17th day of December, received by the defendants.

The Lord Chief Justice delivered his opinion to the jury, that as the letter above set forth did not in terms import that the bill had been refused payment by the acceptor, it was not a sufficient notice of the dishonour and non-payment of the said bill of exchange, to entitle the plaintiffs to maintain and support the action against the defendants; and with that direction left the case to the jury, who found a verdict for the defendants. The counsel for the plaintiffs tendered a bill of exceptions to this direction of the Lord Chief Justice.

* 95 * Judgment having been given for the defendants in the Court of King's Bench, a writ of error was brought in the Exchequer Chamber, and special errors were assigned, which, in Easter term, 1831, were argued before the Judges of the Courts of Common Pleas and the Exchequer, when the judgment of the Court of King's Bench was affirmed. (a)

Upon this judgment, the plaintiffs brought the present writ of error.

(a) See 7 Bing. 530.

On the 17th of June, Justices PARK, LITLEDALE, VAUGHAN, GASELEE, TAUNTON, PATTESON, and BARONS ALDERSON, BOLLAND, and WILLIAMS, having assembled, but the Lord Chancellor not being present, nor either of the Deputy Speakers, the Bishop of Hereford moved, that the Earl of Abingdon should preside as Speaker *pro tem*. The motion was agreed to. Counsel were then called in.

Mr. F. Pollock and *Mr. R. V. Richards*, for the plaintiffs in error.—The object of this writ of error is to bring under the consideration of the House the decision of the Court in *Hartley v. Case*. (a) On the authority of that case, Lord TENTERDEN directed the jury, in the present, to find a verdict for the defendants, but intimated a wish that the question should be carried further. That was an action where the holder of a bill applied by letter to the drawer for payment, described the bill, and expressed a hope that the drawer would discharge it, to prevent the necessity of law proceedings. The Court held that the letter was not such a notice of the dishonour as was sufficient, and therefore refused to disturb the nonsuit that had been entered. That decision has created * considerable surprise in the * 96 commercial world, and too much weight has been given to it in the present instance. In *Tindal v. Brown*, (b) Mr. Justice BULLER said, “There is no prescribed form of this kind of notice; it must import that the holder considers the indorser as liable, and expects payment from him.” The letter of the attorneys in this case did most distinctly import that the holder expected payment from the indorser, for it threatened him with legal proceedings in case payment was not immediately made. The law as stated in *Tindal v. Brown* is adopted in *Bayley on Bills*. (c) A notice that a man is called on to pay a sum of money in respect of a bill of exchange, and that proceedings will be taken against him in respect of it, is a notice that the bill has been dishonoured, for till the bill has been dishonoured the holder cannot proceed upon it.

(a) 4 B. & C. 339.

(b) 1 T. R. 167.

(c) *Bayley on Bills* (4th ed.), 206.

Mr. Whateley, for the defendants in error, was stopped.

Mr. Justice PARK declared the unanimous opinion of the Judges present, that the letter of the plaintiffs' attorneys did not amount to notice of the dishonour of the bill, as such a notice ought in express terms, or by necessary implication, to convey full intimation that the bill had been dishonoured.

The Earl of Abingdon moved that judgment be postponed till the Lord Chancellor be consulted.

Judgment was postponed accordingly.

June 18.

THE LORD CHANCELLOR. — My Lords, this was a writ
 * 97 of error from the Exchequer Chamber, upon * a point which, as it appears to me, ought never to have found its way by writ of error into this place. I never saw a case which, whether regarding the facts, the principle of law, or the cases bearing upon it, was more absolutely free from all doubt. The question, my Lords, is whether the letter of Messrs. Pearce amounts to notice of the dishonour of the bill of exchange referred to in that letter. As this was a point of law, a question was put by your Lordships to the Judges, whether this was a valid notice of dishonour, so as to make the party to whom it was directed, the indorser, liable. The Judges were unanimously of opinion that it was no notice of dishonour. I never thought there could be a doubt that that must be their opinion, and I only doubted whether we ought to trouble them to come here upon such a point. My Lords, I hold that this is no notice of dishonour; it is a threat of legal proceedings, a mere demand of payment. It is clear on authority and by decided cases that a demand of payment does not amount to a notice of dishonour; lawyers and merchants alike know this rule, and they act upon it. When the learned Judges are clear and unanimous in their opinion upon this subject, it seems superfluous in me to waste the time of your Lordships by arguments in support of their judgment; but I will say, that when I see learned counsel sign their names to reasons

of appeal, and bottom those reasons upon cases and authorities, I naturally look to these cases and these authorities, to see whether they bear out the opinions for which they are cited. The case of *Tindal v. Brown* has been cited; that case is in the Term Reports, (a) and is referred to in the fourth edition of Bayley on Bills, p. 206, which authority * is also * 98 quoted in the plaintiffs' "Reasons." *Tindal v. Brown* does not warrant the purpose for which it is cited; but it is remarkable that another case should not have been looked at, the case of *Hartley v. Case*, which is to be found in Barnewall & Cresswell's Reports: (b) if that case had been looked at, it would have been found that it was on all fours with the present. The letter there is in these terms: "I am desired to apply to you for payment of the sum of 150*l.*, due to myself on a draft drawn by Mr. Case on Mr. Case, which I hope you will on receipt discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place." Lord TENTERDEN there said, "there is no precise form of words necessary to be used in giving notice of the dishonour of a bill of exchange, but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor." His Lordship said that the letter did not convey any such notice; yet it is much more explicit than the letter in the present case. The other authority referred to by the plaintiffs is the fourth edition of Bayley on Bills. Why not the fifth edition? For aught I know, the fourth edition was published before *Hartley v. Case* was decided. This I know, that if the fifth edition had been quoted, there would have been found at p. 257 these words: "and the notice ought to import that the bill has been dishonoured; ¹ a mere demand of payment is

(a) 1 T. R. 167.

(b) 4 B. & C. 339.

¹ See Story Prom. Notes (6th ed.) §§ 350, 351, 352; *Strange v. Price*, 10 Ad. & El. 125; *Boulton v. Welsh*, 3 Bing. N. C. 688; *Dole v. Gold*, 5 Barb. 490; *Cayuga County Bank v. Warden*, 1 Comst. 413; *Lockwood v. Crawford*, 18 Conn. 361; *Graham v. Sangston*, 1 Md. 60; *Armstrong v. Thurston*, 11 Md. 157; *Townsend v. Lorain Bank*, 2 Ohio St. 355; *Mills v. Bank of United States*, 11 Wheat. 431, 437; *Bank of United States v. Carneal*, 2 Peters (U. S.), 548; *Ransom v. Mack*, 2 Hill, 588, 593; *Gilbert v. Dennis*, 3 Met. 498; *Pinkham v. Macy*, 9 Met. 174; *Bailey v.*

not sufficient." But it may be said that this is more than a mere demand of payment, it is a threat of proceeding; and such a threat shows that a default must have been committed,

because an indorser is not liable without a default in the
 * 99 other parties. But let your * Lordships read the whole passage, and you will then see that such an argument cannot be used, for the passage goes on thus, "and a threat of legal proceedings is not sufficient." I feel great displeasure, my Lords, at this. Writs of error ought not to be brought for the mere purpose of delay and to subject parties to costs. This is a wrong that you are bound to visit with your just displeasure. It is not because a writ of error is competent to be brought, that therefore it ought to be prosecuted; for if that were the case, then every cause tried in the Courts below would have to be tried over again in this House. It is not because the certificate of counsel is to be obtained in the hurry of business, that therefore writs of error are to be brought here expending the time of the suitors, which is the time of the country; and if your Lordships do not visit such proceedings with your displeasure, this Court may as well cease to be a Court of appeal, for it will become not a place of redress, but a place of vexation. No counsel ought to have signed his name to this case without reading the last edition, not the last edition but one, of Mr. Baron BAYLEY's work on Bills of Exchange. But be that as it may, I hold this case to be one in which for an appeal to your Lordships' House there was not a shadow of justification; and I hope that if there are other cases like this under appeal, they may be withdrawn in time, or the parties may otherwise repent of their pertinacity.

The Lord Chancellor then moved that the judgment of the Court of Exchequer Chamber be affirmed.

Judgment affirmed.

Porter, 14 M. & W. 44; Platt v. Drake, 1 Doug. (Mich.) 296; Young v. Lee, 18 Barb. 187; Beals v. Peck, 12 Barb. 245; 3 Kent, 108.

* The Lord Chancellor moved that the judgment of * 100
the Exchequer Chamber be affirmed, with costs not
exceeding 350*l.* (a)

Judgment affirmed accordingly.

WRIT OF ERROR.

FROM THE EXCHEQUER CHAMBER.

RICKETTS v. LEWIS AND OTHERS.

1834.

RICKETTS : . *Plaintiff.*
LEWIS and Others *Defendants.*

Practice.

The House will not receive from the agent of a plaintiff in error a petition to refer a case to the Judges, to consider the points of law which in his petition such plaintiff states to be involved in the case; but if counsel do not appear to argue for him, will proceed, on the motion of the counsel for the defendant in error, to affirm the judgment of the Court below.¹

June 17.

THIS was an action of trespass *quare clausum fregit*, and was originally brought in the Court of Common Pleas, where judgment was given for the defendants. A writ of error was then brought in the Court of King's Bench, and the judgment was affirmed. (b) A writ of error was afterwards brought in the Court of Exchequer Chamber (c) under the 1 Will. 4, c. 70, § 8, but was struck out of the paper of cases

(a) See *Duvergier v. Fellowes*, *ante*, vol. i. 39.

(b) 1 B. & Ad. 197.

(c) 2 Cr. & J. 11.

¹ See *Fraser v. Gordon*, 8 Cl. & Fin. 718; *Sherburne v. Middleton*, 9 Cl. & Fin. 72, and cases in note.

in that Court, upon the ground that that statute only
 * 101 applied to cases originally commenced * in the Court
 to which the writ of error was directed. The case was
 now brought by writ of error to this House.

The Attorney-General appeared for the defendants in
 error.

Mr. Vickery, the agent for the plaintiff in error, offered to
 present to the House a petition from the plaintiff in error,
 praying that the House would refer the case to the Judges,
 and call for their opinions on the points of law which he
 stated to be involved in it.

Mr. COURTENAY (Assistant Clerk of the Parliaments)
 reported that there was no precedent for receiving such a
 petition.

The Attorney-General said that he was prepared to sup-
 port the judgment of the Court below. As no one was
 prepared to argue against it, he prayed that it might be
 affirmed.

The Earl of Abingdon (who in the absence of the Lord
 Chancellor had presided at the sitting), having consulted
 with the Judges, moved that the judgment be affirmed.

Affirmed accordingly. (a)

(a) See *Gardiner v. Simmons*, *ante*, vol. i. 35.

* APPEAL

* 102

FROM THE COURT OF CHANCERY.

BULKLEY v. WILFORD.

1834.

GEORGE WILFORD BULKLEY *Appellant.*
 ANNA WILFORD *Respondent.*¹

Attorney and Client. Fraud. Professional Knowledge and Duty.

On a contract for the sale of part of an estate, the purchaser requiring a fine to be levied of it for the purpose of removing admitted defects in the title, the vendor employed an attorney, who was his relation, and had been professionally employed by him on previous occasions, to levy the fine and complete the contract. The attorney advised the levying of a fine of the whole of the vendor's estate, without telling him the effect of it; such fine was accordingly levied, and the vendor died without declaring its uses, and without republishing his will, previously made, by which he had devised the whole estate to his wife, who survived him. After the vendor's death the attorney claimed the estate as his heir-at-law, alleging that the will was revoked by the fine, and he brought actions of ejectment to recover possession thereof. The widow filed a bill in Chancery for relief; and on an issue directed by that Court, a jury found that the attorney fraudulently omitted to tell the vendor what effect the fine would have upon a devise of the property comprised in it. The Court of Chancery, upon that verdict, decreed the attorney to be a trustee for the devisee of the lands and hereditaments which so descended to him as heir-at-law. The House of Lords, affirming that decree, further *held*, that the attorney's alleged ignorance of the effect of a fine on a will of the lands comprised in it, and his omission to inquire whether the conusor, his client, had made a will, were such professional ignorance and neglect as afforded a principle by which a Court of Equity might, independent of the ground of fraud, hold him to be a trustee for a third person, of any benefit resulting to himself from his professional ignorance or neglect, to the prejudice of that person.*

¹ S. C., 8 Bligh N. S. 111.

² See 1 Story, Eq. Jur. §§ 219, 310, 311; Lewin Trusts (5th Eng. ed.), 156; Macdonald v. Lillie, 1 Bligh N. S. 315; Nanney v. Williams, 22 Beav. 452; Greenfield v. Bates, 5 Ir. Ch. 218; Purves v. Landell, 12 Cl.

June 23, 25; July 1.

THE respondent, in June 1823, filed her bill in the Court of Chancery, which was afterwards amended, against the appellant and others, and thereby stated that Richard Rich

Wilford was, at the time of making his will, after * 103 mentioned, seised in fee-simple * of the mansion-house called Ranelagh house, with the land, stable, and coach-house thereto adjoining, together with two pieces of land also thereto adjoining, on one whereof there were five tenements erected, and on the other one tenement; the whole of the said mansion-house, lands, and tenements, being situated in Chelsea, in the county of Middlesex, and comprising about two acres; that the said Richard Rich Wilford was also in like manner entitled to another estate, nearly adjoining, commonly called the Ranelagh estate, comprising eighteen acres of land or thereabouts, with twelve messuages thereon erected; and that being so seised and entitled, he duly made his last will and testament in writing, dated the 28th March, 1822, and thereby devised and bequeathed all his real estates and the residue of his personal estate unto the respondent (his wife), her heirs, executors, administrators, and assigns, for ever, and appointed her, and Joseph George Brett and William Augustus Cane, executrix and executors; and the respondent by virtue of such will was in possession of part of the testator's real estates, particularly of the said mansion-house, but the appellant, George Wilford Bulkley, was in possession of other part thereof.

The bill further stated that the testator, previously to the making of his said will (viz., 12th August, 1820), had entered into a contract with John Lawrens Bicknell, solicitor and agent on behalf of the then commissioners of the Royal Hospital at Chelsea, for the sale to them of part (six acres) of the said Ranelagh estate, in consideration of 9000*l.*; and that the testator's title to some part of the said Ranelagh

& Fin. 91; *Corley v. Stafford*, 16 L. J., N. S., Ch. 865; 1 De G. & J. 238; *Ex parte Collins*, 2 Ir. Ch. Rep. 618; *Garrett v. Wilkinson*, 2 De G. & Sm. 244; *Perry Trusts*, §§ 171, 181, 182; *Austin v. Chambers*, 6 Cl. & Fin. 1; *Hart v. Frame*, 6 Cl. & Fin. 193 and notes; *Carter v. Palmer*, 8 Cl. & Fin. 659; *Charter v. Trevelyan*, 11 Cl. & Fin. 714.

estate was complicated, as having formerly been held by trustees for certain shareholders therein, whose shares * were thirty-six in number, the titles to most of them * 104 being separate and distinct; and that in consequence of such complication doubts arose respecting the testator's title thereto; and it was agreed and formed part of the said contract, that the testator should, with a view to its completion, levy a fine of the land so contracted to be sold. And the bill alleged that the appellant, who had been employed by the testator for several years before, and had done much business for him as his attorney, was the attorney employed by him on the said sale; and that from the conversations he had with the testator on the subject and otherwise, he well knew or believed that the testator had made a will, and thereby left his real estates to respondent; and that the appellant, considering himself to be at that time, as he actually was, the heir presumptive of the said testator, formed a scheme of causing him to levy a fine which should in law include the whole of his said property, and thus so far revoke his will; and that with such view and design, the appellant advised the testator not to confine the fine to that part of the said premises called the Ranelagh estate, which was contracted to be sold, but to levy a fine of the whole of said Ranelagh estate.

The bill further alleged that the testator, being wholly ignorant of the effect of levying such fine, consented to act therein as advised by appellant, and accordingly a fine *sur conuzance de droit come ceo*, &c., was by the procurement of the appellant, acting therein as the attorney of the testator, levied in Michaelmas term 1822, of twelve messuages, twelve gardens, twenty acres of land, twenty acres of meadow, &c.; and that the appellant caused the name of said J. L. Bicknell to be inserted in the fine as the plaintiff, in order * more effectually to conceal his design from the testa- * 105 tor and respondent, and that the same might appear to have arisen out of the contract, and that the respondent might be the more readily induced to join in such fine; and that the appellant, though he inserted in the fine such a number of acres as would in law comprise the whole of the testa-

tor's property at Chelsea, took care to insert twelve messuages only, in order that the testator, in case he should look into any of the documents, might have no suspicion that any other property belonging to him was included in the said fine than his property called the Ranelagh property, on which there were exactly twelve messuages; and in order to induce the respondent to join in the said fine, the appellant not only represented to her that it was necessary to confirm the title to such part thereof as had been sold, but he also represented to her, in the presence of the said testator, that it would strengthen and confirm his title to the residue of the said property; and in furtherance of such fraudulent design, the appellant did not state to the testator that the levying of such fine would at law operate as a revocation of any will he might have made, to any extent, but concealed the same from him; that no uses were declared of the said fine; and that the testator died about the 20th day of December, 1822, without having altered or revoked his said will (save and except so far as the same was revoked at law by the said fine), and leaving the respondent his widow, but no children, or brothers, or sisters, him surviving.

The bill further stated and charged that, shortly after the death of the testator, the appellant, conceiving that the fraudulent purpose he had intended to effect was completed, wrote a letter to the respondent, in the words or to the effect following:—

* 106

* " Chelsea, April 3, 1823.

" Madam, — From motives of respect and delicacy towards you, and a wish to avoid the appearance of precipitancy, I have hitherto forbore making any formal entry upon a claim to the property, which, as the legal representative of General Wilford, has devolved upon me in consequence of the general's intestacy. From the same considerations, I refrained adopting certain measures which prudence and policy dictated two months ago, in support of my title; but the period is now drawing nigh beyond which longer forbearance will be impracticable, without compromising the interests of my family in a way that could not on any grounds

be justified. Therefore, I now beg leave to inform you, that in the character of the general's heir-at-law, I claim all those estates in Chelsea whereof the general died seised, and all benefit arising from the same from the day of his decease. That as to such portions of those estates as is in your occupation, I request from you either a recognition of my right, or a tender of possession, with payment of an adequate rent during the period of your occupancy. In the event of your non-compliance with either of my requests, I shall be under the necessity of making a formal entry upon the premises previous to the adoption of further measures. As to that portion of the estate which is in the hands of tenants, I shall require of such tenants payment of their rent for my own use, and an atornment to me, in every case, for the premises they respectively occupy. I trust you will not conclude that I wish to put you to one moment's inconvenience; so far from such being my wish or desire, that I would make any reasonable sacrifice to avoid it; but the existing state of things is such, from the extreme age of one *wit- * 107 ness, and the infirmity of another, that in case of proceedings becoming necessary, in consequence of a refusal to comply with my request, such proceedings cannot be delayed beyond the 12th instant. I have the honour to be, Madam, your very obedient humble servant,

"G. W. BULKLEY."

After further stating that the appellant had continued to claim to be entitled to the whole of the real estates of the testator, as his heir-at-law, alleging that the fine operated as a revocation of the will; and that he had commenced an action of ejectment against respondent, to recover the possession of the whole of the said real estates; the bill prayed, among other things, that it might be declared that the appellant was a trustee for the respondent, of the whole of the lands, tenements, and hereditaments late belonging to the said testator, which had descended to him as heir-at-law as aforesaid, excepting such part thereof, as was included in the said contract with the commissioners of Chelsea Hospital; and that it might also be declared, that the respondent, or the said J. G. Brett

and W. A. Cane, were entitled to receive the purchase-money of the land contracted to be sold to the said commissioners; and that the appellant might be decreed to join with the respondent in conveying the same to the surviving commissioners; and that thereupon the said commissioners might be decreed to pay to the respondent, or to the said J. G. Brett and W. A. Cane, the purchase-money according to the terms of the said contract; and that the appellant might be restrained by injunction from further proceeding in the said action of ejectment.

The appellant, by his answers to the original and amended bills, admitted that R. R. Wilford died seised of the
* 108 estate in the said bills mentioned; and * he also admitted the will, and the contract with the commissioners of Chelsea Hospital prior to the date of the will; and said that the said testator's title to the Ranelagh estate was very complicated, and that the difficulties and obscurities of it were not, as the appellant believed, confined merely to that part of the estate which was contracted to be sold, but extended to the whole of the said Ranelagh estate, which estate, or some parts thereof, had become so intermixed with other parts of the testator's real estates, by the taking down of boundary fences and otherwise, as to be in many instances incapable of being separated or distinguished therefrom; and that in consequence of such complication, the doubts that arose respecting the testator's title to the land contracted to be sold, equally applied to the residue of the said Ranelagh estate not contracted to be sold; and he admitted that he had been employed by the said testator and had done much business for him as his attorney, and was the attorney employed on the said sale, but denied that the testator's will was made by him, the same being prepared and made by Messrs. Ashmore, Few, & Hamilton; and he denied that he knew or believed or suspected that the said R. R. Wilford had made a will; on the contrary, he believed, until after his death, that he had not made any will.

The appellant further answered, that at the time of levying the fine he believed that he was related to the testator, and that it was probable he was his presumptive heir, but he did

not know himself to be such heir, the relationship between him and the testator being distant; and he said that the solicitors of the said commissioners required that a fine should be levied of that part of the testator's property which he had contracted to sell to them, for the purpose of * removing some objections or defects in the title * 109 thereto; and appellant, having been advised and believing that such objections or defects applied equally to the title to the whole of the Ranelagh estate, which, consisting of eighteen acres, with divers buildings thereupon, lay intermixed with and could not be easily distinguished from the testator's other estates at Chelsea, consisting of nearly two acres with the buildings thereupon, in consequence of the said testator having many years ago destroyed the boundaries between them, and made various alterations therein; and being also advised, that if a fine were to be levied which should include the whole of the testator's estates at Chelsea, it would have the effect of strengthening the titles thereto, and that the expense of such fine would not be much greater than the expense of a fine which should comprise only that part which was contracted to be sold; he, under these circumstances and for these reasons, did not confine the fine to that part of the premises called the Ranelagh estate, but extended it, in the description of the parcels, to the whole of the Ranelagh estate, and all the testator's said other estates at Chelsea which lay intermixed therewith. He also admitted that no uses were declared of the said fines, by reason of the unexpected death of the said R. R. Wilford, a few days after the levying of the same; but appellant denied that he had advised the levying of the fine with the view alleged in the bill, or that in any of the matters relating to the said fine he had formed the fraudulent designs in the bills alleged against him, or contemplated any fraudulent purpose whatsoever.

The appellant, in his said answers, admitted that he never stated to the said R. R. Wilford that the * levying * 110 of a fine would at law operate as a revocation of his will to any extent; because his attention was never called to that point, inasmuch as he was ignorant that the said R. R. Wilford had made a will, nor did he know at that time that if such will

existed, it would be revoked by the fine: nor did appellant know of such effect of a fine until he was informed by a conveyancer, some days after the testator's death, that the testator's will was thereby revoked. He admitted that he wrote and sent to the respondent the said letter of the 3d of April, 1823, being upwards of three months after the testator's death, but not from any opinion that his fraudulent purpose as alleged in the bills was completed, because he denied that he had ever intended any such purpose. And he admitted that he had ever since continued to claim to be entitled to the whole of the said testator's real estates at Chelsea, as his sole heir-at-law, alleging, as he was advised the truth was, that the said fine operated as a revocation of the said will; and he admitted that the respondent not having complied with any of the requests made by him in the said letter, he in Easter term then last commenced an action of ejectment in the Court of Common Pleas against her, to recover possession of certain parts of the said estates at Chelsea which were then in the respondent's occupation, including the dwelling-house, garden, and premises, and that he had obtained a verdict in the said action; and that a case had been reserved for the Court of Common Pleas, as to the operation of the said fine with respect to so much of the property in her possession as did not form part of the Ranelagh estate: and he denied

that the said action was brought to recover the possession of the whole of the said testator's real estates * at Chelsea, inasmuch as the appellant was then in the possession or in the receipt of the rent and profits of some portions of the said real estates: and he submitted that he ought not to be declared a trustee for the respondent as the alleged devisee in the said will, inasmuch as the said estates having descended to him as heir-at-law of the said R. R. Wilford, he was entitled to the same for his own use and benefit, and the respondent had no equity to call on him to be a trustee thereof.

On the 7th of April, 1825, the respondent exhibited her supplemental bill in Chancery against the appellant; and thereby, after stating the original and amended bills, she further stated that the appellant obtained a verdict in the

said action of ejectment in the Common Pleas; that by the injunction of the Court of Chancery, subsequent to the said trial and verdict, the appellant was restrained from suing out a writ of possession in the said action; and that he, with a view of taking advantage of the fine which he so fraudulently, and contrary to his duty as a solicitor, and for his own private ends, caused the testator to levy; and endeavouring to take advantage of the said injunction being confined to the action in the Common Pleas; had since commenced an action of ejectment in the King's Bench against the respondent, for the purpose of evicting her from such part of the testator's estates at Chelsea as was not included in the said verdict; to wit, the mansion-house, and all other the premises late belonging to the testator, at Chelsea, and not included in the said Ranelagh estate. The supplemental bill charged that, as the fine on which the appellant rested his title was obtained by gross fraud, the appellant ought to have been restrained from proceeding * in his said second action, and from com- * 112 mencing any other action for the recovery of any part of the said hereditaments: and it prayed that the appellant might be restrained from proceeding in the said action, or at least from suing out a writ of possession on any judgment he might recover therein, and from commencing any other action against the respondent respecting the said freehold lands, tenements, and hereditaments.

The appellant, in his answer to the supplemental bill, stated that his former answers were true, and prayed that the same might be taken as an answer to so much of the supplemental bill as consisted of a reference to or repetition of any of the matters contained in the former bills; and he admitted that he obtained a verdict in the Common Pleas. And he further stated that, by an injunction of the Court of Chancery, he was restrained from suing out a writ of possession; and he admitted that, with the view of taking advantage of the fine (which fine he denied that he fraudulently, and contrary to his duty as a solicitor, and for his own private ends, caused the testator to levy), and endeavouring to take advantage of the said injunction being confined to his proceedings in the Common Pleas, he had since commenced an action in the Court

of King's Bench (a) against the respondent, for the purpose of evicting her from the possession of other of the said testator's real estates at Chelsea; viz., a portion of the
 * 113 mansion-house, * and the stables, coach-house, land, and premises not included in the said Ranelagh estate, but mixed and blended therewith, as stated in his former answers.

The respondent having replied, and issue having been joined between the parties, John Laurens Bicknell, of Greenwich, gentleman, examined on the part of the respondent, said he knew R. R. Wilford about three years prior to his death; was employed by the Commissioners of Chelsea Hospital to enter into and sign the contract mentioned in the pleadings; the appellant acted as the solicitor of R. R. Wilford on that occasion. Many communications passed relative to the levying of a fine of the land contracted to be purchased, which was six acres of the Ranelagh estate; and it was arranged between deponent and appellant that a fine should be levied of the said land, but deponent did not understand from the appellant that the fine was to extend to any other land. Deponent had several conversations with the appellant shortly after the decease of R. R. Wilford; and in one of those conversations, appellant said the fine which was then lately levied of the estates of the said R. R. Wilford was a revocation of his will, and that the appellant would succeed to them as heir-at-law: upon which deponent said that he, on the part of the hospital, should require the executors of the said R. R. Wilford to call on the heir-at-law to be a party to the conveyance of the land purchased for the hospital; but that, as the agreement had been executed by the said R. R. Wilford, the purchase-money would, of course, be personal property, to be received by the executors. The appellant said he (the

(a) This action was tried before Lord Chief Justice ABBOTT, at the Middlesex sittings after Michaelmas term, 1825, and a verdict found for the appellant. Upon arguments afterwards in the Court of King's Bench on the effect of the fine, it was held by the whole Court that it did not pass more than the Ranelagh estate, with the twelve messuages thereon. See 8 Dowl. & Ry. 549-553.

deponent) should wait until the executors communicated with him on the subject. Upon another occasion, deponent, * having accidentally met the appellant, * 114 remarked to him that very great fault was found with him (the appellant) for not having told the said R. R. Wilford that the fine he had levied was a revocation of his will; to which the appellant replied in these words, "Why should I put a sword into the general's hands to cut my own throat?" or words to that effect: and the appellant added that he had no doubt that if the general had lived a short time longer, he would either have republished his will or made a new one.

The witnesses for the appellant deposed to the effect following: Edward Coke Wilmot, of Boswell Court, conveyancer, said that about ten days after R. R. Wilford's death, the appellant, whom he had known three or four years, waited on him on business, when deponent congratulated him on the acquisition of fortune which he was informed appellant was to derive from General Wilford's will; upon which the appellant expressed himself much disappointed with the disposition made by the general of his property, more particularly as he believed himself to be his nearest relative, and, as the executors told him, his heir-at-law. In the conversation which deponent had with the appellant, the latter stated that R. R. Wilford had acquired the Ranelagh estate by purchasing at different times, as opportunities occurred, the respective equitable shares of the different proprietors; and he asked deponent whether the circumstance of the general's acquiring the legal estate subsequently to the execution of his will did not amount to a revocation of the will; to which deponent replied that he was of opinion it did not, but added that if the general had levied a fine or suffered a recovery subsequently to the execution of his will, and without having afterwards republished the same, in that case the will would be revoked. The appellant * appeared to be astonished, * 115 and expressed a strong doubt whether the deponent's opinion on the point was correct, and added that he never before understood that a fine or recovery would effect a revocation of a will previously executed.

Mary Frances Penstone, another witness for the appellant, deposed that she kept a hotel in Cork Street, Burlington Gardens, and that General Wilford, whom she had known for twelve years, came to her house in November, 1822, a fortnight before his death, accompanied by the respondent and the appellant. The deceased was then going to the house of the Lord Chief Justice DALLAS; and the appellant endeavoured to persuade him not to go then, but to defer the business to some other time, as the general was then taken ill with spasms; and the appellant offered to go to the house of the Lord Chief Justice to put off the appointment. The said R. R. Wilford refused to attend to the appellant's suggestions, and appeared to be angry at such request, and declared he was determined to accomplish the business he came upon; and he accordingly went away after half an hour, to go, as deponent understood, to the Lord Chief Justice's house. The respondent then assigned, as a reason for her husband's anxiety to accomplish the purpose for which he came, that he could not settle his affairs until that was done.

Edward Bulkley, son of the appellant, in his depositions described the complicated state of the property; and added, that he was present at a conversation between the appellant and R. R. Wilford, on the Sunday before his decease, when the latter asked appellant when the business of the contract with the commissioners of Chelsea Hospital would be finished, and pressed him to name a day for its completion.

* 116 * When appellant answered that it would be settled in ten days or a fortnight, the deceased said that that would be the happiest day he had experienced for many years; and he gave as a reason for his anxiety, that he intended to settle his affairs when the contract was completed.

William Shirkey, a pensioner of Chelsea Hospital, deposed that, on the morning of the day on which R. R. Wilford died, he was directed by the appellant to take to the general's house a trunk, containing deeds and writings relating to the Ranclagh estate; and when he arrived at the gate leading to the house, the appellant, who had gone there before him, after talking to a female servant at the gate, beckoned the deponent and ordered him to take the trunk back, as the general

was dangerously ill; and deponent believed that appellant was prevented by that circumstance from returning the said deeds to the said R. R. Wilford.

Two other witnesses, one a surveyor, the other a solicitor, deposed to the state of the estates; and said, that by reason of the removal of boundaries, erections of buildings, alterations and intermixture of parts of one estate with the other, it was extremely difficult, if not impossible, to distinguish between the Ranelagh estate and the hereditaments of the said R. R. Wilford which did not form part of that estate.

Hugh Smith, of Cobham, in the county of Surrey, Esquire, said in his depositions that he knew the respondent for twenty years and upwards, the appellant for about twenty years, and R. R. Wilford, deceased, for twenty-five years. That the said R. R. Wilford was, in his lifetime, possessed of hereditaments situate in the parish of St. Luke, Chelsea, in the county of Middlesex, part of which descended to him from * his father, other part thereof by purchase * 117 from John Dixon, Esquire, and other part by purchase of the proprietors of Ranelagh. That he (deponent) was from the year 1801 to 1822 in the habit of being professionally consulted as a conveyancer by the trustees of what was formerly called the Ranelagh estate, in the pleadings in this cause mentioned, in regard to the title of the said estate, and particularly whether the trustees thereof could of themselves dispose of the same without the concurrence of the several individuals equitably interested in the thirty-six parts or shares whereof the said estates consisted, and if not, to advise whether the said individuals had such titles to their respective shares as would enable them and the said trustees to convey a good title to a purchaser: and that, in order to give a satisfactory answer to the said trustees, deponent carefully examined and investigated the title of the said trustees and of the several individuals beneficially interested in the shares of the said estate, and found several of such shares very defective in title, insomuch that deponent advised the said trustees and such of the proprietors as consulted him that they (the said trustees) of themselves, nor with the concurrence of the several other persons claiming the beneficial

Wilford which might be in existence at the time such fine was levied.

The respondent, on the 3d of July, 1829, signed judgment upon the second issue so found for her. The appellant, on the 15th of the same month, applied by motion to the Lord Chancellor for a new trial of that issue, but his Lordship did not think fit to make any order.

The causes having afterwards come on to be heard before the Lord Chancellor on further directions, his Lordship, by a decree bearing date the 30th of July, 1829, declared (among other things), that, having regard to the finding of the jury on the second issue, and to the evidence produced and read in the cause, the appellant, the heir-at-law of the testator R. R. Wilford, ought not to be permitted to take advantage of the fine levied by the said testator; and that the whole of the lands, tenements, and hereditaments, in the pleadings mentioned, excepting such part thereof as was included in the said contract with the governors of Chelsea Hospital, ought to be considered as having passed by his will to the respondent; and that the appellant should convey to her in fee, or as she should direct, all such estate, right, and interest, as had descended to him as aforesaid, in all the said lands,

* 121 tenements, and hereditaments, not comprised * in the said contract: And it was ordered that the appellant be restrained by injunction from commencing or prosecuting any other action at law against the respondent respecting the said freehold lands and hereditaments lately belonging to the said testator, &c.

The appellant presented his petition of appeal to this House from the decree of the 23d of February, 1826, directing the issues; and also from the orders or decrees of the 5th of May, 1828, and of the 15th and 30th of July, 1829, respectively; and therein submitted that they ought to be severally reversed, and the respondent's bills dismissed so far as it was therein prayed that the appellant might be declared a trustee for the respondent of the whole of the lands and hereditaments late belonging to the testator which had descended to the appellant as his heir-at-law; and that he might be restrained by injunction from further proceeding in the action of ejectment in the

bills mentioned, or suing out execution on any judgment he might recover therein, and from commencing any other action at law against the respondent respecting the freehold hereditaments belonging to the testator.

Sir Edward Sugden, for the appellant. — The object of Mrs. Wilford's bill was to make the appellant convey to her the estates which had descended to him as heir-at-law of General Wilford. The Court below directed issues to a jury, in order to ascertain what, if any, fraud had been committed by Mr. Bulkley. The jury found for Mr. Bulkley on one of the issues, and against him on the other. A motion was then made in equity for a new trial, which was refused; and a decree was then made, consequent upon the finding of the jury, according to the prayer * of the bill. The object now is to * 122 review those several orders, and to show that no such orders ought to have been made upon the general equity; but if the general equity did exist, then, upon the particular facts, to insist that there ought to have been a new trial.

The first point made by the bill was, that Mr. Bulkley, knowing of the devise to the respondent, formed a scheme to have a fine levied of the testator's property, for the purpose of revoking the will, in order that he himself might, as heir-at-law, acquire the estates; and that, with such a view, he advised the testator not to confine the fine to that part of the premises called the Ranelagh estate, respecting the title of which doubts had arisen, but to levy a fine of the whole of the estates. It may be necessary to state that, upon argument in a Court of Law, the operation of the fine has been restrained to the parts which were sold, and to the other parts of the Ranelagh estate; and it has been held that the description of the parcels in the fine did not include the whole property. (a) The only part, therefore, now in question is that which is covered by the fine; namely, the Ranelagh estate.

Upon that part of the case relating to the effect of the fine, the Vice-Chancellor, in delivering his judgment directing the issues, was of opinion that it was not at all to be considered necessary, on the part of Mr. Bulkley as a solicitor, that he

(a) See 8 Dowl. & Ryl. 549.

should know what the law was as regards that point. The question has been often tried in Courts of Common Law, that is, whether there has been such negligence on the part of a solicitor as would enable the party employing him to recover

* 123 damages; there are a great many * cases to show that he would not be liable as an attorney, for not having that knowledge which did not belong properly to his branch of the profession. This effect of a fine operating as a revocation of a will, which is now familiar to most of your Lordships, was not formerly so well understood. There is that particular instance of a former Lord Chancellor, (a) to whom, for his patriotic exertions, a person devised a very large estate; and an attorney, also happening to have a particular friendly feeling towards that distinguished person, "to make assurance doubly sure," got that testator to levy a fine; and when the testator had done it, the attorney went to his friend whom he had intended to favour, and told him a great deal about what a kindness he had done him. Upon consulting other learned persons, however, it turned out that the effect of this attorney's kindness was to revoke the will, and send the estate to the heir-at-law of the testator. The anecdote serves to show that it is not generally known among solicitors that a fine has that operation. Mr. Bulkley swears, in his answer, that he had not—and it is clearly proved by evidence, as far as such a thing can be proved, that he had not—that knowledge of the law which would have enabled him to tell the general what effect the fine would have on the will, if he had known there was one; and then it was put in the issues, first, whether the appellant fraudulently induced the testator to extend the fine to the whole property; and secondly, whether he fraudulently omitted to inform the testator that such fine would have the effect of revoking his will. The jury found there was no fraudulent inducement by Mr. Bulkley; it was clear, on the

* 124 evidence, that he not only did not * suggest the fine, but that he actually wanted the levying of it to be delayed, in consequence of the ill state of health of General Wilford; and therefore it would have been impossible for the jury to come to the conclusion that he induced the general to extend

(a) Lord ERSKINE.

it. The evidence of Mr. Hugh Smith showed that he had, for a long time past, suggested the necessity of levying a fine of all the property; and it is not disputed that the fine in the particular case was required by Mr. Bicknell, and never was suggested by Mr. Bulkley.

But the jury found, on the second issue, that there was a fraudulent concealment on the part of Mr. Bulkley; that he fraudulently omitted to inform the testator that the fine would, as to the property comprised in it, revoke any will of the testator previously made of that property. That finding of the jury turned upon a conversation which took place between Mr. Bulkley and Mr. Bicknell, two months after the testator's death. The Lord Chancellor, on an application made to him for a new trial on that ground, refused to grant it; and having refused that, his Lordship, as a matter of course, decreed in favour of Mrs. Wilford, on the ground of this fraudulent omission to inform General Wilford of the effect of the fine. Mr. Bulkley, by this appeal, submits that there ought to have been no issue at all directed; but the issues having been directed, and the first found for him, the second could not, as he apprehends, be made the ground for a decree against him; the evidence produced was such, and the finding, with reference to that, was such as to enable him to have a new trial, and therefore, *quacunqve vid*, there ought not to have been the decree which was ultimately made against him.

* As regards the general question—and a more impor- * 125
tant question never arose — it appears to us that in this case the equity has got a little wide. There is nothing like it in the books; and unless your Lordships and the Courts below stop at some well-known, clear, marked boundary, it is not easy to foresee to what extent you may go. There is nothing in the books of reports, or ever laid down, that goes beyond this, — that if a testator is prepared to do a thing which he had power to do, and the person, who would take his property if he omitted to do that act, makes a representation to him to this effect, “Don’t do it; I will do it myself; don’t give yourself the trouble to make that charge; the property will come to me, and I will take care to do it;” upon such representation,

the act not being done, because the party bound himself that he would do it, the cases go simply to show that that party shall be compelled to do what the testator would himself have done if he had not been prevented by the promise of the party who afterwards breaks his engagement. *Thynn v. Thynn*, (a) *Devenish v. Baines*. (b) This case goes infinitely beyond any thing of that sort. This is not a declaration made, but an omission to make it. This is not that something has been spoken, but that an act done has an operation which has not been declared. This is the first case that ever has occurred in which a man's legal right has been taken from him, — not upon any thing which he has done, for the appellant has done nothing improperly, as the jury have found, — not upon any thing which he has said, for he has said nothing, — not upon any misrepresentation, — not upon any concealment, for

* 126 nobody can say he concealed any thing ; as nothing * was sought to be known, it was not necessary there should be any statement, — but upon an omission to make a declaration, the result of which, as it has happened by a state of circumstances over which he had no control, has vested an estate in himself. There is no proof whatever that the testator himself was ignorant of the effect of the fine ; there is no proof of information withheld by the appellant, as far as he had any knowledge ; there is no proof that the appellant himself knew what the operation of the fine was, so that he could communicate it ; but there is negative proof that he did not know, and he has sworn positively that he did not know, its operation ; there is no proof whatever that he knew a will had been executed ; he swears he did not know it ; and there is no proof whatever that he knew he was heir, and he swears he did not know he was.

Other solicitors (Messrs. Few & Ashmore) were concerned for General Wilford. They had drawn his will, and were concerned for Mrs. Wilford, who joined in the fine ; and they had never told Mrs. Wilford or General Wilford that it would revoke the will. They knew that the will had been executed ; Mrs. Wilford knew that the fine was levied. Suppose Mr. Ashmore or Mr. Few had been the heir-at-law, and that the

(a) 1 Vern. 296.

(b) Pre. in Cla. 3.

estate had been devised to Mr. Bulkley, could he file a bill against Mr. Few or Mr. Ashmore, who, knowing that there was a will, and that a fine had been levied, had not stated the effect of the fine which they did not levy? But, according to this decree, Mr. Few or Mr. Ashmore, in the case supposed, would have been bound to give up the estate to Mr. Bulkley. Nobody ever heard, in a Court of Equity, any thing so wild.

By the contract with the Commissioners of Chelsea

* Hospital, which was entered into in 1820, a fine was to * 127 be levied; it was Mr. Bicknell, solicitor for the college, and not Mr. Bulkley, who suggested and required it. On the 28th March, 1822, the will was prepared by Messrs. Few & Ashmore, who had generally acted as the solicitors for Mrs. Wilford as well as for General Wilford. Mr. Bulkley had nothing to do with that will; it was cautiously concealed from him. In Michaelmas term, 1832, the fine was levied, and Mrs. Wilford joined in it. Your Lordships will not have much difficulty in supposing that she mentioned that to her solicitors. But the great pressure of this case is, that the fine was extended beyond the land contracted to be sold. Now it is not easy to find a case in which, when a fine was required by a purchaser of part of an estate, the vendor did not levy a fine of the whole, meaning to declare the other uses at the time the conveyance was to be made. It was, of course, to make Mr. Bicknell a conusee; it was not intended thereby to mislead anybody; it is sworn by Mr. Bulkley that he had no improper motive in making him a conusee.

Let me now draw your Lordships' attention to the evidence in this case. Mr. Edward Coke Wilmot, who is a conveyancer, and the object of whose evidence was to show that Mr. Bulkley did not know the operation of the fine, states, that about ten days after the death of Mr. Wilford, the appellant attended the deponent on business, when deponent congratulated him upon the acquisition to his fortune from the will of Mr. Wilford; upon which the appellant expressed himself much disappointed, more particularly so as he believed himself to be the nearest surviving relation, and, as the executors told him, the * heir-at-law also * 128 of General Wilford. The appellant then detailed to

deponent the manner in which General Wilford had acquired the Ranelagh property ; namely, by purchasing the respective equitable shares of the different proprietors as opportunities occurred. The appellant then asked deponent whether the circumstance of General Wilford having subsequently to the execution of his will acquired the legal estate (being previously thereto owner of the equitable estate only in the respective shares of the Ranelagh property), did not amount to a revocation of his will ; to which deponent replied that he was of opinion it did not ; but that if General Wilford had either levied a fine or suffered a recovery subsequently to the execution of his will, and without having afterwards republished the same, in that case the will would have become revoked. Upon making that observation, the appellant appeared to be astonished, and expressed a strong doubt whether the opinion given by deponent upon the latter point was tenable ; and he added that, although he had been in practice many years, he had never before understood that the circumstance of a fine levied or a recovery suffered by a testator after the execution of his will, would effect a revocation of such will. So that as far as negative evidence can go, it is proved that the appellant did not know this effect of a fine ; and your Lordships will always bear in mind that he has purged his own conscience by swearing over and over again (the question has often been put to him) that he was not aware that that was the effect of a fine, nor that a will had been executed.

The evidence also shows that there was a disposition on the part of the appellant to prevent the general from levying
 * 129 the fine. Mrs. Penstone, who * kept an hotel in Burlington Gardens, deposed, “ that R. R. Wilford was at her house, accompanied by the respondent and appellant, about a fortnight previous to his death ; that he was very much indisposed ; that he was on his way to the house of the Lord Chief Justice, as he then informed deponent ; that the appellant endeavoured to persuade him not to proceed at that time on the business, but to defer it to some future period, assigning as a reason his being so much indisposed ; that he refused to attend to the request of the appellant, and appeared to deponent to be very angry at such request, and declared that

he was determined to accomplish the business on which he had set out; and the respondent gave as a reason for the anxiety her husband expressed to accomplish the purpose, that he could not settle his affairs till that was done." This settling of his affairs meant the making of his will; and that the general was anxious to make his will is evident from the conversation between him and the appellant, as stated in the depositions of the appellant's son, "that General Wilford asked the appellant when the business of the contract would be done, and repeatedly pressed him to name a day for its completion; and the appellant answered that he thought it would be settled in ten days or a fortnight, to which General Wilford replied that that would be the happiest day he had for many years; and gave as a reason for his wishing to know when it would be, and to have it completed without loss of time, that he intended to settle his affairs when the contract was completed." His object then was to hurry the thing as much as possible, in order that he might settle his affairs. To settle his affairs was of course to make his will. It is proved by another witness that he was directed * by * 130 the appellant to take the deeds home; that when he arrived with them at the gate leading towards the general's house, at that moment he was informed the general was just dead. That is only proved in order to show a fair and *bona fide* winding up of the matter on the part of Mr. Bulkley; that he was entirely closing, as far as regarded himself, the whole transaction. As to the description of the property, there is the evidence of Mr. Hugh Smith, which was afterwards read at the trial, to show that he was the person who originally advised, and who afterwards repeated that advice to the appellant and to General Wilford himself, to levy a fine of the whole of that property, in consequence of the different natures of the title; and Mr. Bicknell, upon his cross-examination, stated expressly that he was the person who required the fine to be levied.

As far as the evidence goes, there is nothing to show — there was nothing when those issues were directed — that the testator himself did not know what the effect of the fine was, or that Mr. Bulkley knew what its effect was; on the

contrary, there is evidence to show the latter did not know it. So that every thing which could lead to a fraudulent omission, supposing he was bound to declare it, every circumstance is absent. He did not know, first of all; he could not tell what he did not know, and he swears he was ignorant as an attorney of the operation of the fine: and it is proved by Mr. Wilmot that he expressed great surprise when he was told it had that operation. If, then, your Lordships should be of opinion that he did not know of its effect, as the fair result of the evidence, *quoad* this question, there was

nothing to try by an issue, because he could not
 * 131 fraudulently omit to inform his client of that which * he himself was not informed of. Where could be the inducement for him to commit such a fraud? He did not know he was heir; if he had known that, he might then reasonably have inquired if there was a will. He knew he was a relation and an object of great regard with the general, who had provided for several of his children. If there was a will, nobody had a right to be more favoured in it than Mr. Bulkley himself. Can you suppose, therefore, if he had known there was a will, that he would have directed a fine to be levied to destroy that will? To suppose that, is to suppose insanity. He might be destroying his own prospects; for no one was more likely to be provided for than himself, under the will of General Wilford. There was no sufficient ground, therefore, to rest the case on, in order to bring before a jury a question of a fraudulent concealment.

Your Lordships are aware of the great importance of an answer in this case; because if you (a plaintiff) come to establish your title in a Court of Equity, and you ask the defendant, as you have a right to ask him, and to force him by the penalties attached to false swearing, to state all he does know, if he swears he is not guilty of the act with which you charge him, that he has not and never had the knowledge upon which you would lay the foundation for your equity, — the consequence is you cannot fix him with that from which he has entirely purged himself, for a man has a right to have his answer read; unless you can disprove that which he swears, as your equity depends on the case you have made,

and he flatly denies it by his answer, you are not entitled to a decree at all. The alleged equitable title cannot succeed, because it is not proved. It is of the essence of this case to look to what the defendant has sworn; * and * 132 I have shown to your Lordships, in answer to the several bills, that he has repeatedly pledged his oath, and there is no attempt at disproving it, that he did not know the effect of the fine as regarded the question of revocation: he did not know he was heir-at-law, and did not know a will was made.

My Lords, there is another point which is exceedingly important to be considered in this question as regards the propriety of the conduct of Mr. Bulkley, if he had even known the operation of the fine. Few & Ashmore were the general's confidential solicitors; Mr. Bulkley was a relation, and, as such, an object of the general's bounty; and he was employed by him in those matters in which no confidence was necessarily placed in him; as, for example, no confidence was necessary in completing the sale of part of the estate, beyond that which you would place in any respectable solicitor. But there is considerable confidence necessarily placed in the man who has the preparing of your testamentary disposition. The contract of sale may be known to all mankind; there is no reason why it should be concealed: the other is only known to yourself and your confidential solicitor, and you desire it shall not go further. Now the general did not employ his relation to draw his will, being desirous probably that he might be kept in ignorance of his testamentary dispositions. It was known that Few & Ashmore were the regular solicitors, both of the general and of Mrs. Wilford, in all confidential matters; would it not have been therefore a piece of impertinence on the part of Mr. Bulkley to have spoken to the general about his will?

The whole case before the jury on the trial of the issues turned upon the conversation which took place between Mr. Bulkley and Mr. Bicknell, and which is * put very * 133 loosely in the depositions in the cause. It appears that there were two interviews between them; the first was about six weeks after General Wilford's death; the second was within a week after that, and did not last more than five minutes. Mr. Bicknell says the appellant informed him at

the first interview that the fine was a revocation of the will of General Wilford, and deponent did not recollect that he did then make any remark thereon; but that on another occasion, when deponent was at the Green Man Inn, on Blackheath, and just as he was entering a room there, the appellant came up to him, and deponent then remarked that very great fault was found with the appellant for not having told General Wilford that the fine he had levied was a revocation of the will; and in reply the appellant said, "Why should I put a sword into the general's hands to cut my own throat?" and upon deponent's saying that he ought to have informed the general that the fine was a revocation of his will, the appellant replied, "that he had no doubt that if the general had lived a little time longer, he would either have republished his will or made a new one." Now is a man's estate to be taken from him for a rash observation in a casual conversation of this sort? In the first conversation, six weeks after the death, not a word is said by Mr. Bicknell in disapprobation as to the omission to state the operation of the fine; but one week after that again, which is seven weeks after the general's death, and when this matter became the subject of casual conversation, Mr. Bicknell attacks Mr. Bulkley on the ground of his not having made the communication. This conversation is made the foundation of a decree against Mr. Bulk-

ley. Now, in the first place, does the observation
 * 134 itself * warrant the decree which has been made?

How much might depend on the manner and tone in which it was said, the present or the past tense, with reference to the question which was asked? But what does it amount to? Mr. Bicknell thought fit to enter into a question of morals: Mr. Bulkley might very well say, "If you put it upon me as a matter of professional duty, as to whether I knew there was a will, whether I knew I was heir, whether I knew the operation of the fine, I cannot enter into all that discussion with you here; but if you are putting this as an abstract question of morals, then I say, 'Why should I put a sword into the general's hands to cut my own throat?'" Did he by these expressions admit that his acts were fraudulent? Are you to believe that a man in this casual way would make an

admission which would take an estate from him? You cannot infer fraud; you must have it proved. Suppose he did express those words, they were expressed in the hurry of the moment; but when you come to interrogate the man on his oath, he swears positively that he did not know, and there is the evidence of Mr. Wilmot to corroborate that he did not know, the operation of a fine; he swears also that he did not know he was the heir, and that he did not know there was a will. Every fact from which your Lordships could infer any desire on the part of Mr. Bulkley that this fine should have the operation which it had, tends to a contrary conclusion. I submit therefore, on that part of the case, that there ought to have been no issue at all directed; but that in point of law, and upon the facts of the case, there ought to have been a decree to dismiss the bill.

The issues were, first, whether the defendant fraudulently induced R. R. Wilford to extend a fine * levied by * 135 him, beyond the property sold to the commissioners; secondly, whether the defendant fraudulently omitted to inform Mr. Wilford that the fine would revoke his will as to the lands comprised therein. On the trial of these issues, Doctor Lancy was examined, and he stated that "he attended General Wilford; that he died suddenly, not being ill more than half an hour; understood him to have a large fortune, and heard him mention Mr. Ashmore as his legal adviser." Then Mr. Few was examined, and he said, "We were the solicitors for preparing testator's will; I have attested the execution of more than one will for him. I saw him twice, the last was in November, 1821; he called to re-execute the will; he called also the 14th of June, 1820, on account of a recent purchase of Ranelagh estates." By this evidence, it appears not only that Few & Co. were the solicitors for preparing his wills, but that the general was in the habit from time to time of republishing his will or making a new will as his property changed. Your Lordships cannot, therefore, look at this testator as a person who was not taking advice of his own confidential solicitors.

The evidence of Mary Wilcox, who was not examined in the cause in the Court of Chancery, had great influence on

the jury. She said she lived in testator's service; often saw the defendant with the testator. "I was at home," she says, "with my mother, on account of my bad health;" she lived in one of the testator's houses, very near to him. "Defendant called at my mother's on the Saturday after the testator's death. He came into the parlour, and said, 'Well, how do you do, Mary? So the poor general is dead; he has not

left you a farthing, you will not get your fortune; never
 * 136 mind, there is a flaw * in the will; the property is mine,
 and I will take care of all of you.'"

Here is a young woman called to prove this statement of Mr. Bulkley, in order to show that at this early period he was aware that the will was revoked, in contradiction of that which he has positively sworn, and which is corroborated by Mr. Wilmot in so strong a manner. Let us consider the probability of this; and suppose this girl was cleaning the house, and while she was scrubbing in comes Mr. Bulkley, and without the least reason in the world to induce him, he tells her and her mother that there is a flaw in the will, the property was his, and he would take care of them! But the mother does not appear to have heard a word of this; for the girl says her mother told her she did not hear it, and the girl herself never mentioned it till this cause was the subject of discussion; and her mother had in the mean time become a tenant of Mrs. Wilford's. The inference to be drawn from these facts is, that the daughter wished to benefit the mother, and trumped up this story; for it has not the slightest foundation of truth, and it would be absurd to give it credit. We had no intimation that any such evidence existed, or was about to be produced at the trial; if we had known it, we should have had no difficulty in rebutting it. If Mr. Bulkley had said all this, would she not communicate it sooner? would she not have run to her mother with breathless haste, and exclaimed, "How very fortunate! the general's will is revoked; we don't get a fortune under the will, but Mr. Bulkley is going to take care of all of us." This is a sort of declaration, which, if it had been made, she would have communicated to her mother. But she says that

she only mentioned it to her a week or ten days before
 * 137 the trial. The mother did not recollect any * thing

about it; when asked, she said that she never heard it. That there is the foulest perjury in this statement there can be no doubt whatever. It is disproved by the oath of Mr. Bulkley, made long before any such evidence was pretended to exist. It was never suggested that there was such evidence, or that such a person would be brought before the jury; and therefore I submit to your Lordships, that as this evidence had considerable effect on the jury, and came by surprise upon us, the Court of Chancery should have granted a new trial, if your Lordships should think that there ought to have been any trial at all. If your Lordships should think there was no such case made by the bill as justified the directing of the issues, then, seeing that the first issue was found for Mr. Bulkley, namely, that there was no fraudulent inducement, I submit to your Lordships that you must still dismiss the bill, because the fraudulent omission does not arise unless there was a fraudulent inducement. The two things are necessary to give an appearance of equity to the case. But if your Lordships should decide against me on that point, then I confidently submit that there ought to be a new trial of those issues, on the ground of the introduction of the evidence of Mary Wilcox.

Mr. F. Pollock, on the same side.—The question here resolves itself into the equity of the case, and the law, which is the trial of the issue. The first of those is disposed of. On the subject of the equity, I shall not, following my learned friend, trouble your Lordships at any length. I need not point out to your Lordships the danger that might ensue, if upon light grounds, if upon other than the most satisfactory and conclusive evidence, questions of this sort were to be entertained. One can easily put a variety * of cases * 138 where an equity might be considered to be perfectly clear. Thus, if it were made out satisfactorily that a man had sent for an attorney to make his will, who happened to be his heir-at-law; that, the testator being ignorant of that fact, and the attorney conscious of it, the will is made, two witnesses are sent for, the testator suggests a third, the lawyer assures him that a third is not necessary; the will is exe-

cuted with two witnesses, and the testator dies. If all these facts were made out to the entire satisfaction of the Court, I can understand that it would *pro tanto* repeal the Statute of Frauds, and give effect to a will of real estate with two witnesses.

My Lords, I have always understood that fraud is a matter that cannot be inferred, it must be proved by distinct and clear evidence. It is not sufficient that there should rest in the mind a suspicion, there ought to be something far beyond suspicion; there ought to be grave, distinct, clear evidence that what is affirmed by the verdict of the jury on the second issue is the fact. It is not becoming a Court of Equity to send a suspicious case to a jury, in order that they may find a verdict in accordance with the secret wish of that Court, and that that verdict should be used for the purpose of doing what the Court of Equity could not have done without it. That is a very dangerous practice; and great injustice may be done unless a Court of Equity is exceedingly guarded in its appeal to a jury, — with all the respect that I have for the verdict of a jury, when a matter is properly and distinctly raised before them by any pleadings, subject to the correction of a Judge, who will know when to nonsuit the plaintiff, — but upon an issue sent from the Court of Chancery, if there is the slightest ground of suspicion, the Judge who

* 139 tries it would be bound to leave the matter to * the jury, and send back their opinion to the Court above; a nonsuit in such a case cannot take place, there must be a verdict for the plaintiff or defendant. If the Court of Equity was minded to obtain the verdict of a jury for the purpose of taking a course to which it saw its way in no other form nothing would be more easy than to send any case of suspicion to a jury, and to ask them to give effect to that suspicion, by finding a verdict according to the course that the suspicion would lead to. In nine cases out of ten, on any such question as this, the verdict must be for the plaintiff, with the advantage of an opening speech, and with the advantage of a reply if the defendant gives any answer by evidence. I must say, from all the experience I have had, if questions of this description be so sent for the decision of a

jury, that the rights of the subjects of this country would not be safe.

My Lords, I can hardly conceive a more unfortunate sort of issue than this, or one in which a common lawyer, acquainted with the practice and the course of proceeding before juries, would not anticipate this same result which has occurred. If they had brought this issue to me, I should have said, "Is there the slightest pretence for suggesting, — is there a point of the weakest sort on which you can hang a suspicion? if there is, take that issue to a jury, and I am certain the verdict will be against Mr. Bulkley." I would appeal to any common lawyer, whether a man ever has a fair trial in an indictment for a conspiracy or a fraud, with the opening speech stating and aggravating all the circumstances. The defendant by his counsel states his case, and what he has in answer, and then comes the reply. I am appealing to the experience of your Lordships on the subject; and if this be a notorious fact in the history of the administration of the law with respect to matters *sent to a jury *140 to try in cases of fraud and suspicion, it is a reason why a Court of Equity should be very cautious in sending a matter of this sort to a jury to deal with those suspicions which, if I may with all respect say, the Court of Equity wishes to act upon, but feels that it dare not: whenever there is a case of suspicion, I should say to the Chancellor, "If there be only suspicion, send the case to a jury and you will immediately get what you want, — the verdict of a jury that the suspicion is well founded." The point that I would present to your Lordships' attention is this, that an issue, such as this, so vaguely stated for the consideration of a jury, whether a man did do or omit to do something from a fraudulent intention, — an issue more fraught with danger, more calculated to work injustice, and to put it in the power of a Court almost to make what decree it pleases if founded on the verdict of a jury, can hardly be imagined to have occurred in the history of the law.

Let us now consider the question of fraud: what is the evidence of that? nothing but some declarations that Mr. Bulkley is supposed to have made after the whole thing had

been consummated, and which, if taken as they are proved, are perfectly reconcilable with Mr. Bulkley's entire innocence of the charge imputed to him. It is perfectly consistent with all expressions that fell from Mr. Bulkley after the testator was dead, and that he was entirely unimpeachable in the transaction, that whatever knowledge he had, he had acquired after the testator's death. What is the effect of the finding that the defendant did not fraudulently induce the testator to extend the fine? As compared with the other issue, and the finding of the jury upon the one and the other, is not this the

result: that wherever you have legitimate means of
 * 141 getting at Mr. Bulkley's conduct and intention * you discover them to be honourable; and it is only where you are not guided by evidence and conducted by fact, but left to suspicion, that you can impeach his character? When the jury are bound to acquit him of the substantial part of the charge, how monstrous it seems that they should convict him when there is nothing but suspicion! The jury find that, because he was in a situation to be benefited, he fraudulently omitted to do some act, which act is the cause of any benefit that could accrue to him. Upon the trial of these issues, there was no distinct evidence upon which a jury could safely act.

My Lords, it is suggested to me, and being in connection with the trial before the jury, I would just mention, that Lord TENTERDEN laid it down as a maxim of law, and told the jury distinctly, that they ought to presume that Mr. Bulkley knew the effect of the fine. For many purposes undoubtedly it may be taken that the attorney ought to have known that, but there was not a tittle of evidence to prove that he did know it.

[LORD WYNFORD. — Did not Lord TENTERDEN say he ought to have known it?]

I recollect perfectly well that his Lordship told the jury to presume that Mr. Bulkley knew the operation of the fine.

THE EARL OF ELDON. — That is a question of great import
 [114]

ance. I confess myself, I should have thought, and I hope it will turn out to have been argued in the Court of Chancery, that the Court would hold the doctrine, that an attorney should not have the benefit of any thing, where he derives that benefit from ignorance of that which he ought to know.

Sir Charles Wetherell. — That was argued in the Court below.

* THE EARL OF ELDON. — For that reason, I confess I * 142 should hesitate for a long while before I sent an issue at all. I believe I am speaking in the presence of gentlemen who know (whether I am right or wrong in that, is perfectly immaterial) I generally decided every thing myself that I could decide. You see it is a very different thing to say that a man has been acting fraudulently; that is what one would hesitate a long time before imputing it to anybody. But if you can sustain it, — I mean if you can take this as a general principle, that an attorney shall not be heard to say that he did not know what he ought to have known; that may happen to a man, perhaps, whose moral conduct in the transaction may be as pure as possible.

Mr. F. Pollock. — I was stating what fell from Lord TENTERDEN on this subject. He said, "You ought to assume that the defendant did know what the effect of a fine was." Now the Vice-Chancellor (the present Master of the Rolls) said that was a question for the jury, and accordingly sent it to a jury: when we got to the jury, Lord TENTERDEN said, "No, that is matter of law, we ought to presume as against an attorney." I can understand the equity that one of your Lordships has alluded to. Whenever an attorney has been concerned in any transaction, be it conveyance, fine, will, or any thing else, he shall never, as against his client, or any person claiming or to claim under the client, have any pecuniary benefit from that transaction, either by commission or omission. That is quite intelligible; and if that be the ground on which this case is put, that is a question for my learned friend Sir EDWARD SUGDEN to grapple with; but in

the mean time, I do hope your Lordships will think
 * 143 * that that is a question that should have been disposed
 of by a Court of Equity ; that the issue ought not to
 have been directed ; that, being directed, it ought not to have
 been so found upon the evidence that was produced before
 the jury, and therefore that the verdict so found ought not
 to have been acted upon.

Sir Charles Wetherell, for the respondent. — We have *ab initio* protested against an issue being granted, as it placed the trial of the question upon a much more favourable footing for the appellant than we could consent to ; for if he could have shown on the trial that he was morally guiltless, that is, did not *ex animo* perpetrate a fraud, it was possible the result might have been different from what it now is. Fraud, as applicable to a case of this sort, is twofold ; as first, if a man meditating a fraud knew that there was a will, and knew that the fine would revoke it, and also being heir-at-law, knew that unless the will was republished the fine would bring the property to him as heir, and take it away from the devisee ; assuming these as facts proved, we say they would constitute one of the grossest cases of moral fraud that can be stated. But assuming, in the alternative, that the individual did not know that he was heir ; did not know that a fine would revoke a will and bring the property to himself, and that therefore his conscience was exempt from moral turpitude, still we hold that there is a second view of fraud in the contemplation of the law ; a constructive fraud, depending upon the legal principle, that if A is bound in his professional duty to give B advice to do a particular thing, and is so ignorant of his profession that he advises B to do a thing
 which B would not do except under that advice, and
 * 144 which even upon that * advice he would not do if he were informed of the consequence of the act, this ignorance of A, of the effect of an act which he is bound to know, simple ignorance, free from moral turpitude, in legal construction constitutes a fraud.

My Lords, at the time the fine was levied, the property is represented to have been worth about 30,000*l*. The portion

sold to the Chelsea Hospital for 9000*l.* amounted to about six acres or less than one-third of the whole ; so that the question is, whether it is the advantage of ignorance or premeditated fraud that has operated to bring into the pocket of the appellant, who gave this advice, property which was worth 20,000*l.* ; a tolerably good *douceur*, a pretty smart bonus for a man's ignorance ! Who would not be ignorant of the law of fines and recoveries ; what man would perfect his knowledge ; who would ever look into the books, and disadvantageously throw away his time, if he is to obtain so very considerable a remuneration for his ignorance of his duty ! I acquit Mr. Bulkley of being the perpetrator of that inceptive fraud of representing a fine to be necessary. The fine being proposed, and being undoubtedly necessary in respect to the land which the hospital had purchased, I will not make against the appellant the uncharitable insinuation of representing that there may not have been a considerable colour for him to have said to his employer, " Why, if you are levying a fine of a part of the Ranelagh estate, it is not amiss that you levy a fine of the whole." Your Lordships are aware that a part of the estate at Ranelagh was not held under this complicated title which was formerly vested in thirty-six proprietors. The mansion-house, and some other property, consisting of land and messuages, were not embarrassed

* with that difficulty ; but when the fine came to be * 145 levied, the descriptions not only embraced that portion which was sold to the hospital, but the whole of the property held under this divided and split title, and also the other property at Ranelagh which was not subject to any difficulties or complication of title. It is admitted by the appellant in his answer, that he never informed his relation, whose confidential adviser he was, that this fine would revoke his will, — the antecedent will, which, as your Lordships know, gave the whole of the general's real estates to his widow. I wish here also not to do Mr. Bulkley any injustice ; he had not made the general's will, he had no participation in the making of the will. I will suppose that he had not known what the dispositions of the property were, and consequently had not used this fine for a stratagem to supplant the will. I

strip the case of all those prejudices which Mr. Pollock, in his episode of misleading counsel and misled juries, tells us, nine times out of ten attend every issue in which a widow or a person standing in *misericordia* on one side makes a claim against an attorney on the other, contrary to the rules of plain justice. It is admitted by the appellant, that no information was given by him to the general that the fine would operate as a revocation of the will. The general dies, and after that Mr. Bulkley, not immediately, but some short time afterwards, writes a letter to the widow to tell her that all the unsold property of Ranelagh is his. He does not say when this posthumous knowledge, this emanation of light, broke in upon him, that the fine had operated as a revocation of the will; but that he learned it soon after the general's death is very evident from the date of his letter informing the

* 146 widow that he claimed the whole * estate; and that was not an idle threat, for it was followed up by two ejectments brought by the appellant to recover possession from her of the whole of the estates.

The line of argument in the Court below on the respondent's bill, praying relief from the proceedings at law, was to this effect: giving up the fraud of moral turpitude, the counsel below relied on the legal construction of the facts, of the confidential attorney of a man, recommending him to levy a fine, in perfect ignorance of its operation; and of the ignorant adviser by its operation obtaining that property which he whom he advised had by his will given to another person; that that act itself constituted, by legal presumption, a fraud, and that the public policy of this country made it a fraud for all the purposes for which equitable relief could be given; a fraud as cogent on the protection of a Court of Equity as a fraud combined with moral turpitude; and the more so, inasmuch as, unless your Lordships lay down the rule, as Lord TENTERDEN did on the trial of the issues, that in a case of this sort the legal adviser must in law be presumed to know that which he ought to know, as a fact you could hardly go into the metaphysics of it, because as to what passes in the attorney's mind, whether he did or did not know it, would be a nugatory issue, which could not as a matter of fact in one

case out of one hundred be affirmatively or negatively established.

The proof of the appellant's ignorance that a fine operated a revocation of a will depended on the evidence of Mr. Wilmot, who stated in his depositions in the cause in the Court of Chancery, that some time after the death of the testator, he met Mr. Bulkley, whose face represented a perfect mask of surprise when he was told that this fine had that effect. It is * a singular thing that when this case * 147 afterwards was sent to a trial upon the issues, this person was not called as a witness to prove the fact of ignorance on the part of the appellant of the legal operation of the fine. What he stated in his depositions in Chancery might have been evidence on the issues; if any thing had passed in conversation on the matter, that conversation would have been evidence. This gentleman, or any one else who could have related facts from which the jury could come to the conclusion that the appellant was really ignorant of the state of the law, ought to have been produced; and yet he, the only one who at all comes near the fact, was not called, though he was examined in the Court of Equity, and his examination had some influence with Sir JOHN LEACH in directing the issues.

My friend who last addressed your Lordships has appealed as it were to the conscience of Judges in equity. He says there are cases in which they have not fortitude enough to come to their own conclusion, but leave it to juries to come to that conclusion which they do not dare to express themselves. We know that that very learned individual Sir JOHN LEACH has been more firm in directing issues than other Judges of Courts of Equity have been; there has been upon many occasions a marked difference between him and a noble and learned Lord now sitting on one of the benches of this House. There are cases where it is notorious that that learned and noble Lord, so long Chancellor, would not direct issues without holding that it was the bounden duty of a Judge in equity to come to a conclusion, if he could safely come to that conclusion on the evidence before him, and not send the case to a jury. Sir JOHN LEACH, on the other

* 148 hand, relaxed that rule, and granted * issues, where the other Judges of a Court of Equity would have refused them and assumed to themselves the task of concluding upon the facts. This issue was directed by his Honor, while we maintained throughout the proposition of constructive fraud in law, as well as the fraud founded on moral turpitude; insisting that if the appellant knew and meant the fine to revoke the will, then it was a fraud of moral turpitude; but if he were ignorant of it, and moral turpitude did not exist in the case, that then the constructive legal fraud remained unshaken. The appellant now contends for the proposition that no issue at all should have been directed, and that unless we can prove moral turpitude the case is not within the reach of a Court of Equity; for both Sir EDWARD SUGDEN and *Mr. Pollock* totally threw aside the question of constructive fraud, founded on the ground of a man's being ignorant and unable to perform his duty, and profiting by his own ignorance; and contended that from the beginning there ought to have been no issue at all granted, and that all the proceedings consequent thereon were irregular. In order to show that a knowledge of the effect of a fine was not very common among attorneys, a case has been mentioned as occurring in Lord ERSKINE's time, who, it is said, lost an estate because the adviser of the gentleman who gave it did not know that a fine would operate a revocation of a will. There was in that case, whether the story is true or not, an ingredient which does not occur here; though the Lord Chancellor ERSKINE did not get the estate himself, the ignorant attorney did not get it, as the result of his ignorance; and therefore that is a kind of case which does not help the appellant. But we have the judgment of

* 149 Lord TENTERDEN on the law of * the case, whose decision has been confirmed by Lord Chancellor LYNDHURST, in his refusal of a new trial. The case now coming here, has there been any view of it stated, any principle broached, any authority cited, to shake that decision? It is very true, as Sir EDWARD SUGDEN said, that many of the cases where a man, from being the beneficial owner, is converted into a trustee, are cases either of contract or of fraud of moral tur-

pitute ; now the jury in this case finding against the appellant on the second issue, have affirmed the proposition of moral turpitude. It may be true that most of the cases, where a man was converted into a trustee on the ground of having meditated and completed a fraud, are cases of contract or of a will obtained either by misrepresentation or information withheld. These cases occurred frequently when Lord HARDWICKE was Chancellor. In the case of *Barnesley v. Powell*, (a) he laid it down broadly, that not only where a will was fraudulently obtained, but that where a fine was fraudulently obtained, the person setting up a title under such fine was as much to be converted into a trustee as if it were the case of a will obtained by fraud. Lord HARDWICKE, in that case, particularly refers to the case of a fraudulent fine. *Mr. Pollock's* argument goes almost this length, that however unconscientious, inequitable, unfair, improper, may have been the means by which the fine was recommended and levied, it is not to be disturbed in a Court of Equity. I only refer to this argument now for the general proposition of Lord HARDWICKE, who says in the case cited, (b) "though the Court of Equity cannot set aside a judgment of a common-law Court, obtained against conscience, yet will it decree the party to acknowledge * satisfaction on * 150 that judgment, although he has received nothing, because it was obtained where nothing was due ; so it cannot set aside a fine for being obtained by fraud and imposition, as the Court of Common Pleas to a certain degree and with some restrictions may ; yet on a conveyance so obtained this Court never sends the plaintiff to the Common Pleas to set aside such conveyance, but considers the person obtaining the estate, even by fine, as a trustee, and decrees him to reconvey, on the general ground of laying hold of the ill conscience of the party to make him do what is necessary to restore matters as before." It would be superfluous for me to quote cases to illustrate a principle almost coextensive with every mode in which a person unfairly acquires title to property, whether by deed, will, bond, judgment, however externally perfect, however legally perfect, may be that title. The

(a) 1 Ves. Sen. 120, 284.

(b) P. 289.

proposition of Lord HARDWICKE is commensurate with every species of cases, and is founded on the principle that the unimpeachable legal title is an impeachable title in equity, if by forcing the conscience you can convert a man into a trustee for the person whom he has originally supplanted.

My learned friend *Mr. Pollock* has not troubled himself with the history of this case, but he asks your Lordships, "Why not lay down the rule *à priori*, that an attorney shall never take any thing from his client?" That would be a very severe rule indeed; that is not a rule of the law of England; but a rule of the law of England from the earliest times is, that he may take the gift, but he must also show that it was fairly acquired. In the French law, it is a rule of incapacity *à priori*, that a confessor, a physician, a surgeon, an apothecary, a manager or confidential person,

* 151 can take *no property whatever from his friend, his client, his patient, if it is given at the time while that relation between the parties may be supposed to have any influence whatever. But that has never been a rule of the law of England, of which the rule has been, not that a person is incapable of taking, but that he should show that improper influence was not used. There is no rule that a trustee, even, cannot take a benefit; there is no incapacity *à priori*, but he must show that the transaction was fair. The point for consideration is this: does not the public policy of our law require that an individual, who gives advice to his client, shall not, whether from the moral turpitude of design, or from the legal fraud of ignorance, give to him that advice which is to have the effect of taking from the client's intended devisee the property devised, and of drawing it to himself,—an effect derived solely and entirely from his ignorance? This is a case of *crassa negligentia*, or *crassa ignorantia*, and it is upon that ground Lord TENTERDEN's opinion of it must be understood to rest; an opinion in which the late Lord Chancellor clearly concurred, in his refusing to grant a new trial of the issues.

The appellant's counsel seem pleased to suppose that there is no parallel case to this: says Sir E. SUGDEN, "You must show me a case like this, if you insist on sustaining the decree

of the Court below." Now it happens that we can produce a parallel case, notwithstanding the novelty of the circumstances; a case not the worse for being decided by that very eminent and acute lawyer, Sir ANTHONY HART, when he was Lord Chancellor of Ireland: the very case which we are discussing here, with reference to an attorney not advising his client that a fine would revoke his will of real estate, has occurred * with reference to personalty, in the * 152 instance of a counsellor in Ireland drawing a will and being executor in it, without telling his client, the testator, that his being made an executor would, *ipso jure*, carry to himself the residue of that property. It is the case of *Segrave v. Kirwan*, (a) decided in 1828. The marginal note to the report is this: "Personal estate not disposed of by a will drawn by the confidential counsel (the sole executor), without informing the testator of the legal effect of the will, held to be a trust for the next of kin; for it was the bounden duty of the counsel to have informed the testator that if he made no disposition of his personal estate, the law, in consequence of his being the sole executor, would entitle him to retain it for his own benefit; he was bound to inquire of the testator in plain and distinct terms, whether it was his will that he should retain the personal estate for his own benefit." In that case the next of kin appeared to have been persons of whom the testator knew nothing; certainly it does not appear from the case that he had them at all in view when he applied to the defendant, a learned counsel, to give him advice in making his will. That defendant said in his answer, that he was convinced that "the testator, in making his will, never had his next of kin in contemplation, and that he did not know even who they were; that in July, 1809, he had received the instructions from the testator; that he did not commit them to paper; that he left the testator's house then, and did not return till the middle of August, when he received the same instructions, and wrote a draft of a will accordingly." So that the learned counsel was desired to make a will for the testator, and to name himself therein as

* the sole executor, not a word being mentioned about * 153

(a) 1 Beat. 157.

the next of kin ; and Sir ANTHONY HART, in his judgment, declared that the defendant in that case "should have told the testator, when he made him executor, that the constitution of that character would carry with it the residue of the personal estate." That case seems to have been very fully argued. *Barnesley v. Powell*, and other cases, among which were some cases decided by Lord ELDON, were referred to, and the doctrine was gone into very fully ; and Sir ANTHONY HART, having gone through some of the cases of wills improperly obtained, said, "I have no difficulty in pledging myself to this principle of equity : wherever a professional man is called on to give his services to a client, whether to prepare a deed or will, the law imputes to him a knowledge of all the legal consequences, and requires that he should distinctly and clearly point out to his client all those consequences, whence a benefit may arise to himself from the instrument so prepared ; and that if he fail to do so, equity will deprive him of it." The principle of law, therefore, has been practically laid down in a weaker case than the present ; because, if a lawyer is sent for to make a will for a client, who says, "I will make you my executor," and does not say, "Shall I give something to my next of kin ?" or has not the name in his recollection, there it is a very different case from this, in which a will having been made, there was an antecedent right, in the moral sense of the expression ; an antecedent bounty, which had actually passed from the devisor ; a mind made up to give to a particular individual, and that gift is supplanted by the ignorant advice of the lawyer.

The case in Ireland is not so strong ; it is not a case of * 154 a revocation of a will made ; it is not * a case of supplanting a gift ; it is the case of a man who has made no will ; who sends for counsel to advise him to make his will ; the thing is sketched out, the party making it not mentioning his next of kin, or any other personal legatees ; the counsel made his executor ; and yet the rule there laid down is stricter in principle and more extensive in its application than is required in the present case.

A Court of Law acts upon the principle of compelling compensation for mere ignorance ; a Court of Equity, where the

specific remedy is administered, compels a man to give up that which his ignorance acquired to him, and made another person lose. If it were otherwise, an attorney may make a will or any instrument, and the rule would be, that he is not bound to know whether the advice which he gave was to operate to displace a gift antecedently made by will or other instrument; and that the more ignorant the attorney, the better and the safer will be the enjoyment of the fruits of his ignorance. That principle would be subversive of the rules that regulate the relation between attorney and client. Unless it is conceded that the principle of equity is applicable to professional ignorance as well as to moral fraud, your Lordships will practically find that there is very little difference between ignorance and design, or, in other words, that a man may be designedly ignorant.

With respect to the trial of an issue in cases like this, in ninety-nine cases out of a hundred you cannot prove one way or the other the proposition of knowledge or ignorance; it is nugatory, therefore, to try the question as a question of fact, which in such a majority of cases it is almost impossible to ascertain. A case of fraud or moral turpitude you may try; but in taking a distinction * between the *res gestæ* * 155 of the original design and the moral turpitude of that design, and allowing that equitable relief may be given in the one case, but denying it in the other, where the party giving the advice may shelter his conscience, and may say that in the eye of God he has not committed the fraud, because he did know he was committing it, — a distinction between frauds profitably practised in a state of ignorance, and frauds practised under a state of the knowledge of the law, — your Lordships cannot practically enforce your own metaphysical distinction, and no certain principle can be established. I apprehend, therefore, with great deference to your Lordships, that in a case where we have the authority of principle, — where we have, after full consideration of this case, the authority of Lord LYNDEHURST, and of Lord TENTERDEN also, in his ruling to the jury on the issue; and where we have, in the case last cited, an enforcement of the same principle carried infinitely further than this case, — your Lordships will

feel yourselves compelled, under all the circumstances, to affirm the decrees and orders appealed from.

Sir William Horne, on the same side. — This is a case of the greatest importance, not only in respect of the amount of the property, but also of the principle involved in it. The property consists of about 20 acres; there is one title to about $2\frac{1}{2}$ acres; there is quite a different title to the remaining $17\frac{1}{2}$ acres. The $2\frac{1}{2}$ acres General Wilford either inherited or took by devise from his father; the remainder of the 20 acres he had acquired by various purchases from different owners. Mr. Bulkley admits by his answer, that he never asked General Wilford for the title-deeds to those $2\frac{1}{2}$ acres; so * 156 that the general could not have no idea that the fine would affect them. Mr. Bulkley being the general's confidential solicitor in the contract with the Governors of Chelsea Hospital, the general put into his hands the business of making a title to six acres purchased by them, a portion of the $17\frac{1}{2}$ acres. General Wilford did not, as was insinuated in the argument for the appellant, want to improve his own title to any part of the estate; the demand for the fine was made by the purchasers, to whom it was a matter of the most perfect indifference in what state the title would remain to any portion of the property *ultra* the six acres purchased. Mr. Bulkley does not pretend to say, that he stated to the general that a fine was necessary to cover either the whole $17\frac{1}{2}$ acres, or the whole 20 acres. No evidence is given of such statement; and the counsel at the bar have not attempted to state that any communication was made to the general, or that the general had reason to suppose that the form of the conveyance would in any way whatever affect any portion of the property, except the six acres sold. Mr. Bulkley, therefore, by extending the fine to the whole estate, took on himself to do that which unquestionably was beyond his instructions and his duty.

In his bill of costs, delivered after the general's death, which was in evidence at law, he charged the general with 75*l.* 12*s.*, "for my time and labour in this part of the affair" (that is, as to the titles in the levying of a fine), "no regular

charge in detail can be made ; and therefore, as the business was done on my own responsibility, without the expense and assistance of counsel, usual on such occasions, I insert, subject to your approbation, two guineas in respect of each abstract, amounting in the whole to 75*l.* 12*s.*” By that the appellant meant to say, “I honestly think myself competent to do it: I have *saved you the additional expense of counsel: * 157 if counsel had been employed it would have been 100*l.* ; but as I have done it on my own responsibility, give me 75*l.* 12*s.* I have saved you the difference.” Could it be possible for this gentleman, if this *item* in his bill were read to him, to say what his counsel have been instructed to say for him, — that he was ignorant of the elementary principles of the law of England ? But whether he was ignorant or cognizant of the law, is wholly immaterial in respect of the relief prayed against him by the respondent.

With respect to the argument for the appellant on that part of his answer in which he said, that “at the time of levying the fine he believed he was related to the testator, and that it was probable he was his presumptive heir, but he did not know himself to be such presumptive heir,” in that answer, taken by itself, there is enough to satisfy any Court of justice that he did believe he was the heir ; and all doubt of his belief, and knowledge too, on that subject, is removed by the evidence of Mary Wilcox, who was a witness on the trial of the issues. She swore, and she was cross-examined, and not in the least degree shaken in what she had sworn, that Mr. Bulkley, on the first Saturday after the general’s death, — he died on Thursday or Friday, — had a conversation with her, in which he alluded to the fact of the succession of the property having fallen to him, and that he said “there was a flaw in the will.” Not that there was no will ; he was lawyer enough to know there could not be a flaw in that which did not exist ; he knew, therefore, the next day after the death of the testator, not only that there was a will, but also that he was heir to the testator ; he knew also that the consequence of the fine he had levied was to put an end to the will ; for that fine was the only flaw in the * will, * 158 and the very flaw to which these words referred, for

if they did not refer to that they were nonsense. This examination proved more than was necessary to prove; for it was not necessary in this case to prove that positive fraud which the jury have truly found by their verdict; but if it were necessary, it was proved by the evidence of this young woman, taken in connexion with the omission of the appellant to call his own witness, Mr. Wilmott: for respondent being plaintiff in the issue, this girl being examined for her, and cross-examined for the appellant, why did he not then call Mr. Wilmott to contradict her? Mr. Bicknell, another witness, said, that in a conversation between himself and Mr. Bulkley, the latter being asked why he did not communicate to General Wilford that the fine would at law revoke the will, said, "Would you have me arm the general with a sword to cut my own throat?" That reply, in connexion with the evidence to which your Lordships' attention has been just drawn, proves the whole case against the appellant. This vulgar phrase, translated into plain English, means that Mr. Bulkley, the confidential agent and solicitor in levying the fine, did not think it safe for his own interests to inform the general of the effect of the fine, as the consequence of his so informing him would be, as of necessity he knew, that the general would instantly republish his will. If, therefore, it were necessary in support of the decree below to impute to the appellant positive fraud, the case is not wanting in evidence to that extent.

But let us consider that we are not dealing simply with evidence of fraud against an individual, but with a doctrine in equity of the greatest importance; and that the question is, whether a professional man shall be permitted, not
 * 159 only to go free and unpunished * in respect of the damage which his ignorance has done to another, disappointing altogether the hopes and the directions of his employer, but also to have the property, taken from his employer or his employer's devisee by his ignorance, transferred as the fruit of that ignorance into his own pocket? Perilous and lamentable indeed would the state of the law be, if the dealings of mankind were subjected to either of these alternatives.

Your Lordships' attention has been drawn to the difference

between the two titles, the one to $2\frac{1}{2}$ acres, the other to $17\frac{1}{2}$ acres; but your Lordships may not be aware, that for part of the property, the very house and premises in which the testator's widow was living, and which formed a portion of the $2\frac{1}{2}$ acres, this appellant immediately on the death of the testator brought an ejectment. It is not denied that it was not the intention of the testator to include the $2\frac{1}{2}$ acres in the fine. The testator disregarding intention, and taking advantage of the rule of law in his favour, brought his action, but it was found by the jury that it never was intended that they (the $2\frac{1}{2}$ acres) should be included in the fine. And yet this gentleman, standing on his character, and wishing your Lordships to do justice to him more for the sake of his character and family than of this property, thought proper to instruct his counsel to argue against the verdict in that case, being determined still to spurn at the general's (his benefactor's) intention, and to insist upon the law for turning this widow out of the habitation left to her by her husband. There was consequently a solemn argument on the doctrine of the law as applicable to the case; and the result was, that the Court of King's Bench agreed with the jury, that it was never intended to include that part of the property in the parcels, and that it ought to be * considered as not included. (a) * 160 By that fortunate act of justice, this lady had at law an escape from that part of the case.

The property, therefore, the right to which your Lordships are now called upon by appeal to decide, is the Ranelagh estate, exclusive of those $2\frac{1}{2}$ acres; and the question is, whether the appellant is to be the beneficial owner of the remainder, or a trustee for the respondent? As to authority for the decree in favour of the respondent, we have no authority of cases, for no case similarly circumstanced has ever occurred; but if authority means principle, the books of digests and reports are full of it. No man can contend that the form of the assurance, if it be fraudulently obtained, makes the slightest difference in respect to principle. If a man be cheated of his estate, whether by fine or recovery or release or any other conveyance, is the fraud less because

(a) 8 Dowl & Ry. 549.

the cheat had the cunning to accomplish it, or is the security to him in point of law greater? What *Mr. Pollock* said about perfection of title at law, is not very intelligible to persons conversant with Courts of Equity. People come into Courts of Equity, only because they have not an adequate remedy at law. The very form and mode of coming into a Court of Equity, and the substance of the relief granted there, is this, that the defendant being proved by competent testimony to have obtained the property fraudulently, that Court holds this salutary admonition, "you have got it by fraud, you shall hold it as a trustee for the man whom you have deprived of the legal title, but who still has a right in equity to the property, and therefore you shall be turned into a trustee for him." That is the doctrine which the Courts below, by the decree, declared in this case.

* 161 * *Sir Edward Sugden*, in reply. — My Lords, *Sir William Horne* has charged fraud upon the appellant. There is not a shadow of pretence for that charge, and there is not a particle of evidence to prove it. There were so many shares of this property, that it was almost impossible to make out a title to any part, without levying a fine of the whole. *Mr. Hugh Smith* advised the fine to strengthen the general's title; and in the contract with the hospital, *Mr. Bicknell* peremptorily required a fine to be levied with a view to the validity of that contract. It is in evidence that *Mr. Bulkley*, so far from suggesting the fine, advised the general not to go to the Lord Chief Justice's to levy it. How could *Sir William Horne*, then, undertake to say that fraud was proved against him? But then it is said he is guilty, not of a moral fraud, but of a fraud upon public policy. When a man is acquitted of a moral fraud, it is not easy to understand how he can be charged under the same circumstances with a fraud upon public policy. It is in proof that the appellant did not know that he was heir-at-law, did not know that the general had made a will, and did not know the effect of the fine.

It is alleged that if ignorance is to be an excuse for attorneys, it will also be an excuse for surgeons, and will defeat all actions against them for ignorance. There is no analogy

between the cases. A surgeon is bound to know the science of his profession; if he is called in to set a man's broken leg, he is bound to do it in a scientific manner; but an attorney is not bound to know the law scientifically. Cases have arisen at Nisi Prius, in which it has been ruled, that if an attorney makes a mistake upon a nice point of law, not generally known to attorneys, he is not * answerable. (a) * 162 Nothing is more dangerous than a very learned attorney, who, instead of being a benefit, may be a great nuisance. Attorneys, as a class, do not profess knowledge of the law; if your Lordships will by law impress it upon them, they will find it a very troublesome gift; it will not answer the purpose either of themselves or their clients.

[LORD WYNFORD. — You would not require an attorney to have so much knowledge of the law as the Lord Chancellor or Lord Chief Justice; but ought we not to require an attorney to know the consequence of an act he is constantly in the habit of doing as an attorney?]

This was a nice point of law: it is well known to your Lordships, and it is quite surprising to everybody who knows the rule perfectly, how any attorney could be ignorant of it; but most attorneys did not and do not know it. The question is whether they are bound to know it. There is no denying that a counsel well informed in one branch of the profession, may be very ignorant of questions of law which belong to another branch; then how can a knowledge of the whole range of the law be expected from an attorney, who has to go into common law and equity and into every Court? His business is to get up the evidence, and to get all the facts well together, but it is not his business to pronounce on the law.

One of your Lordships, who knows the whole history of all the cases of revocation of wills from the earliest time, and from whose judgments we all derive on that subject so much information, knows that it was not always so easy to say what

(a) See *Montriou v. Jeffries*, 2 C. & P. 113; *Potts v. Sparrow*, 6 C. & P. 749.

would operate as a revocation of a will ; some of the
 * 163 most learned * Judges doubted as to what was or not
 a revocation of a will, and whether or not a subsequent
 conveyance, although it had no operation as a conveyance,
 had that effect. *Lord Lincoln's Case*, (a) *Doe v. Otway*. (b)
 Lord Lincoln, thinking he was going to marry, executed a
 settlement by lease and release, and made several limitations
 in contemplation of his marriage, no one of which ever took
 effect, because the marriage never took place ; and yet that
 settlement was held to be a revocation of his antecedent will.
 The decision in *Doe v. Otway* was against the opinion of
 Lord Chief Justice EYRE ; and it has been said by Lord
 MANSFIELD, that "the absurdity of *Lord Lincoln's Case* is
 shocking." (c) Would your Lordships require an attorney
 to know that on which the most eminent lawyers have
 differed ? There is not one attorney in twenty employed to
 levy a fine, that would have told a man it would operate as a
 revocation of his will ; they never would have thought of
 stating such a thing ; it is not their business to point that out ;
 they are not thinking of the man's will, but of levying a fine.
 Suppose this were the case of a common marriage settlement,
 with the usual limitations of a fee-simple estate, and that the
 settlor had previously made a will ; there is a revocation of
 the will by the settlement. Is there any attorney who, being
 employed to prepare that settlement, would have told the
 settlor that it was a revocation of the will, and that he must
 republish it ? He has enough to do to execute the purpose
 for which he was retained, without looking to the conse-
 quences ; and those who are conversant with the prac-
 * 164 tice in the alienation of real property, know * that not
 one attorney in one thousand in London would tell a
 client, on levying a fine, that it would operate as a revocation
 of his will, unless his attention was called to the matter. It
 would, besides, have been a most indecent thing for the
 appellant to have said a word about the will ; he was not the
 person employed in the general's testamentary dispositions ;

(a) 1 Ab. Eq. 411 ; Show. P. C. 154.

(b) 7 T. R. 399 ; 1 Bos. & Pul. 576.

(c) *Doe v. Pott*. Doug. 710, 722.

and if he had ventured on that subject, the general most probably would have been more angry with him than he had been when he advised him not to go to the Lord Chief Justice's, and would have ordered him out of the room, and would have said, "What have you to do with my will? I never consulted you about my will; pray confine your advice to what I have consulted you upon."

The case of *Segrave v. Kirwan*, the only authority cited against the appellant, is entirely different from this case. There the intimate friend and confidential counsel of the testator had on more than one occasion drawn wills for him, and in none of these wills was he himself an object of bounty. The testator, in giving him instructions for his last will, requested him to be his executor; he consented to the request, and drew the draft of a will, in which the testator did not dispose of his personal estate; but it is clear from the statement of the case, that he did not intend that gentleman to have any beneficial interest in that estate. The result, however, of appointing him executor was in law to give him the undisposed-of residue of the personalty. That result was open to many distinctions in a Court of Equity; there were many circumstances upon which that Court would hold an executor a trustee of the property; as upon the circumstance of there being a bequest of a specific legacy to the executor, or upon the circumstance * that a man has * 165 treated himself as a trustee, and that he was appointed to take the legal interest only; or upon a fraudulent appointment; (a) and by the late Act, (b) the executor, in every case of a residue undisposed of, is made a trustee for the next of kin, according to the Statute of Distributions. Now this gentleman being a counsel, was bound to know the rule of law; he did not communicate that knowledge, and the Court of Equity justly deprived him of the property which he took as executor; but if it had not done that, it would have taken away his stock in trade as a lawyer; if it had held that he did not know or ought not to have known the law, it would have destroyed him as a professional man, while it would

(a) *Foster v. Monk*, 1 Vern. 473; *Marriot v. Marriot*, 1 Str. 666.

(b) 11 Geo. 4 & 1 Will. 4, c. 40.

have left him the property. But if your Lordships say that this appellant had the knowledge, which he swears he had not, and which he is not required to have, you do not give him any benefit in that respect, while you take the property from him. It is a disgrace to a counsel not to know such a rule of law; it is dishonest not to make himself master of that on which the security of those who consult him depends, and for which the world gives him credit; therefore you cannot impute such ignorance to a counsel. He was a practising counsel, a confidential adviser, and consulted as such; he took upon himself the duty to advise. The whole case shows there was a confidence in him, and the Court of Equity acted upon that, and held him a trustee, because the testator meant to give him nothing in the shape of benefit. The party here also (the general) had no intention to give; there was no intention of one to take, or of the other to give.

* 166 The taking * was the mere effect of a rule of law operating *in invitum*.

In the case in Ireland, the learned Judge referred to several cases, some of which were decided by Lord ELDON when he was Lord Chancellor; but those were cases of contract, showing how far an attorney can contract with his client; and it was held very properly in them, that if an attorney will deal with his client he must deal with him at arm's length, and show he gave him all the information which he had. (a) But the case now before your Lordships is not a case of contract, but of the simple operation of the law, which, by force of the fine, vested the property in the appellant; so that neither the principal case of *Segrave v. Kirwan*, nor the cases cited in it, have any just application to this case.

My learned friends have declared themselves quite as strong as I am against the necessity of the issue; if then an issue was not necessary, it ought not to have been directed; and your Lordships therefore ought to decide the case now on the evidence that was before the Court below. The case made by the pleadings was that the appellant fraudulently induced the general to levy the fine, and fraudulently omitted

(a) *Gibson v. Jeyes*, 6 Ves. 226.

to tell him what its operation would be. Nobody ever thought of arguing the case in the first instance, except upon the ground and the assumption which is made in the bill, — that there was a fraudulent inducement. The jury, on the trial of the issue, were asked whether the appellant fraudulently induced the testator to do the act. The question could never have been asked, if, in the opinion of the learned Judge who directed the issue, a foundation had not been laid for it by the form of the pleadings in the * cause. The * 167 issue was whether the appellant fraudulently induced the testator to levy the fine, and the jury said he did not. Now if he did not fraudulently induce, he did not induce at all. He could not have fraudulently induced, for it is in evidence that he was against the general's going to levy the fine. If your Lordships take away all inducement, which the jury on the evidence has done, then there is nothing to rest the case on but the fraudulent omission. What is that? A fraudulent omission to communicate, implies previous knowledge. If it be laid down as an abstract rule of law that an attorney is bound to have the knowledge and to communicate it, one can understand that rule, whether right or wrong; but one cannot understand what is the meaning of asking whether a man fraudulently omitted to make a statement, unless in the very asking the question it is admitted that he was not bound to have or to communicate the knowledge. The learned Judge who directed the issue held that he was not bound, as an attorney, to have the knowledge, and that there was no imputation upon him as an attorney that he had it not, and therefore the issue was framed with that view; because if it were asked, "did he fraudulently induce the act, and then did he omit to inform?" that would lead to a different inference; but where it was asked first, "did he fraudulently induce the act?" and secondly, "did he fraudulently omit to inform?" that form of the question showed that the mere omission amounted to nothing. He might omit because he did not know; he might omit because he did not think it material; and in neither case would the omission be a fraud. The appellant has sworn that he did not know that which he was charged with omitting to communicate.

* 168 Your Lordships, *sitting as a Court of Equity, are bound to believe what a defendant has sworn to in his answer, unless it is contradicted by one witness, with circumstances in aid of that one witness, or by two witnesses. Nobody at all has contradicted, nobody could contradict, what the appellant has sworn, that he was not aware of the operation of the fine, and that he did not know there was a will. If ever a case was perfectly divested of all circumstances to induce a man to commit a fraud, this is the very case; for unless he knew he was heir; unless he knew there was a will devising away the property from him; unless he knew of the operation of the fine, and that it would revoke a will; there was no improper motive that he could have, not in interfering, because he did not interfere, or when he did his interference was unsuccessful, but in not informing General Wilford what the operation of the fine would be. Then on what ground is a Court of Equity to take the estate from this appellant? It may be a case for your Lordships' compassion, when you know all the circumstances; when you are told there was a will, which gave the estate to the widow; when you are told, as the fact turns out, that the appellant was heir to the testator; and when you are told of the fine, and find that the operation of it was to revoke the will, and devolve the estate on the heir-at-law. Ten thousand other wills have been revoked by similar accidents; (a) the fault, if any, is to be charged on the law, that allows a will to be revoked without the knowledge of the testator. Your Lordships have seen so much of the effect of that law in favour of

the heir, that you must know that thousands of times
 * 169 heirs-at-law take estates which * they never were intended to have. It is the common rule of law; if it is not the right one, let us have a better; but while it remains it is subject to accident, and one may win or may lose, but we must take the law as we find it.

There is nothing in this case to fix even a shade of suspicion on the moral conduct of the appellant; and Sir Charles Wetherell acquitted him of all moral turpitude: but advantage has been taken of the words used by the appellant, in

(a) See *Locke v. Foote*, 5 Sim. 618.

a loose and casual conversation with Mr. Bicknell, "Why should I put a sword into the general's hand to cut my own throat?" That was a figurative expression to get rid of an improper question, on an occasion which did not give an opportunity for explanation. That was no admission that the appellant had contemplated a fraud in the levying of the fine. The whole transaction was then long concluded, and it would be most unreasonable to suppose that a man of common sense would ever admit so unnecessarily that he had acted as a consummate scoundrel.

Independently of the appellant's solemn declaration that he did not know what would be the effect of the fine, Mr. Wilmot's evidence also goes to show that he had not the knowledge. Then they say on the other side, "Why did we not produce Mr. Wilmot on the trial at law?" Because *Sir James Scarlett*, who conducted the cause, was of opinion that Mr. Wilmot's evidence could not be received; for it was mere conversation between him and Mr. Bulkley; and that was the only reason why Mr. Wilmot was not called. The only question now is, whether the evidence at law altered the case made in the Court below. The witness Mary Wilcox was not examined in equity; the respondent did not state * that she had any such witness; * 170 the appellant was utterly taken by surprise by her improbable story. That evidence throws great discredit upon the case on the other side. Mary Wilcox, in her examination, stated that her mother was present at the supposed conversation, in which she stated that Mr. Bulkley said he would provide for them all; and that, upon speaking afterwards to her mother about it, the mother said she never heard of any such thing. How could she? No such conversation passed! The daughter invented it: the mother not only did not hear this conversation, but she never heard of it. It is impossible such an offer could have been made, and such a promise given by Mr. Bulkley, without having excited great hopes in the family, and led to repeated conversations on the subject; yet not the slightest notice is taken of the promise; no application is made by these Wilcoxes for the least relief, although they were not above relief.

There is not the slightest credit to be given to that evidence. It took the appellant by surprise, as he never heard of it, and the girl did not pretend that she told any human being that such an offer had been made. She married subsequently, yet she did not communicate it to her husband. It is quite clear the young woman brought forward this testimony to please Mrs. Wilford, in whose service or in whose house at that time her mother was living, for the purpose of doing some service to her mother. If your Lordships strike out this witness's story, as tainting and corrupting the case brought forward on the other side, then it stands only on the evidence in the Court below; but if your Lordships place the least reliance on that witness, we ask confidently for a new trial. We shall
 *171 be able to prove that what *she stated was not true, and to satisfy the jury, if they placed any reliance on her evidence, that her story was one of her own invention. On all these grounds we hope that your Lordships will either dismiss this bill, or, if you think that part of the case has not hitherto met with a sufficient answer, that you will now direct a new trial.

THE EARL OF ELDON. — My Lords, this is a case undoubtedly of very great importance, and I should be extremely sorry if your Lordships were to come to a judgment on it without its being fully and clearly understood upon what principle you proceed in deciding it. My Lords, I may perhaps be wrong, but I cannot help thinking — and I am now stating only what I have often stated before, and what I again recommend in my old age, from the experience I have had in the Court of Chancery — that the habit, too much adopted, of sending matters in equity for the decisions of Courts of Law, which ought to have been decided in the Equity Court, have led, in many instances, to very bad consequences. I have the comfort of hoping that I always did my utmost to save parties from that expense; and my practice was governed by what I thought most expedient for the ends of justice.¹

I now come to the decree in this case, which was made on

¹ For the present English practice, see 2 Dan. Ch. Pr. (4th Am. ed.) 1071 *et seq.*, and notes.

the merits in 1826. Two issues were then directed to be tried at law, but with them we have nothing to do now. The first thing for your Lordships to decide here is, whether it was the duty of the appellant, the attorney, in levying the fine, to make inquiry, when the fine was proposed to be levied, whether General Wilford had made a will or not.

Your Lordships may venture to say, at least, * that it * 172 is a point of great importance, and that it ought to be decided one way or the other, whether the attorney should know the effect of the fine; and if he did know that, whether he was to be at liberty to take advantage of his knowledge; and if he did not know it, whether he was to profit by his ignorance; whether he was ignorant that the fine revoked the will, not whether he was to be visited with the consequences of his fraud. It is also a matter of great importance whether these points in this case — after it has travelled through Westminster Hall for eleven years — should not now be settled; and whether the Court of Chancery should not have settled them after it had all the evidence before it. My Lords, a case was cited in the argument at the bar; it was decided in Ireland: I remember having heard a great deal about that case at the time when it was decided; and I perfectly well recollect the opinions of many learned persons about that case (persons who are now sleeping in their graves), all agreeing that that case was well decided. I have since taken the liberty of asking a loan of that case. It was decided on this principle, — not that there was a fraud on the part of the gentleman who was defendant in that case, and whose conduct was then dealt with; but on this principle, that a man should not take to himself the benefit of his ignorance in matters of which he ought to have knowledge. And if I remember rightly the circumstances of that case, there was no reason for saying that the gentleman who gave advice there knew that any benefit would come to himself by being appointed executor. [His Lordship stated at length the circumstances of that case. (a)] Your Lordships understand well what * a material interest the gentleman obtained by his * 173 being appointed executor, in the then state of the law;

(a) *Segrave v. Kirwan*, 1 Beat. 157.

because, if there was no residuary legatee, and if no legacy was given by the will to the executor himself, he would take the whole of the residue of the testator's personal estate. The principle of the decision in that case was this, that there was no fraud, that the gentleman meant no fraud, but that it was considered as against public policy, that a man who ought to know the law which would give the executor the clear residue of the personal estate for his own benefit, — it was against the policy of the general law that he, by being made executor, should take to himself the benefit of his own ignorance. That, my Lords, is a very important case to be considered in deciding the present case; and I should like to have time to look into it, and into the law in Ireland on this subject. During twenty-five years that I had the honour of presiding in the Court of Chancery I carefully avoided (I am sure I was not in the habit, — I know, I meant avoiding), whether in matters relating to bankruptcy, or any other thing that came before me, putting the parties to the expense of trying issues one after another, visiting the parties again with further expense in moving for new trials in the Courts of Equity, just as if the case on the record did not in itself afford some principle of equity by which I might decide the case. But if the record did not allow me to decide the case upon such principle, I made it my duty if it went to a jury (I know I intended it to be so), to deliver the parties as soon as possible from the protracted evils of the suit. In this case I think there ought to have been a *quietus* for the defendant, or a decree for the plaintiff, in 1823; but your Lord-

* 174 ships have seen by this record what has *since taken place. My Lords, I should be sorry if I ventured to recommend you to give final judgment without looking into the cases which have been cited at your Lordships' bar, and such other cases as may be in my own recollection. This case has been hanging on from 1823 to 1834, yet I hope your Lordships will not think I am asking too much if I ask the short interval between this and Tuesday next to consider and dispose finally of this case.

On the motion of Lord WYNFORD, the further consideration
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of their Lordships' judgment was postponed to the Tuesday following.

July 1.

THE EARL OF ELDON. — Your Lordships are now to pronounce your judgment in a cause which, I am sorry to say, was instituted in the Court of Chancery so long ago as the year 1823. My Lords, if the view I take of this case be correct, it appears to me that the judgment might have been pronounced long since. The circumstances of the case are these: Richard Rich Wilford was seised at the time of making his will of lands and hereditaments at Chelsea, in the county of Middlesex, consisting of a mansion-house called Ranelagh-house, with the appurtenances, together with certain pieces of land adjoining, comprising about two acres. He was likewise entitled to another estate near adjoining, called the Ranelagh estate, comprising about eighteen acres. He made a will dated the 28th of March, 1822, by which he devised all his real estate to his wife, the respondent in this appeal, in fee. Before making the will he had entered into a contract with the Commissioners and Governors of Chelsea Hospital, on behalf of himself and the other proprietors of the Ranelagh estate, for the sale of part * of * 175 that estate to them. It appears by the pleadings in the case that the title to the Ranelagh estate was complicated, and, in consequence of that, doubts arose respecting the title to so much of that estate as was contracted to be sold; and therefore it formed part of the contract that the testator should levy a fine of the lands respecting which such doubt had arisen. It appears that the testator, upon many occasions before, had employed other solicitors than the appellant; I think Mr. Ashmore was one. The appellant, who is an attorney, was a relation of the testator. The necessity of levying a fine arose out of the persons who were concerned for the Governor and Commissioners of Chelsea Hospital, thinking it would be desirable, as unquestionably it would be, to have a fine levied of those premises, in order that they, as the purchasers, might be sure of having a good title. It became therefore necessary to levy such fine. The appel-

lant in this case being, as I understand, an attorney, was employed for the purpose of giving a satisfactory title to those who had bought this parcel of the testator's estate.

My Lords, I observe it is stated that the appellant either was informed, or thought it was advisable, that a fine should be levied, not only of that part of the estate which had been contracted for by the Chelsea Hospital Commissioners, — not confining the fine which was levied to those premises where necessity called for the fine, but he thought proper, whether in consequence of its suggesting itself to him, or having it suggested by others, does not, I think, clearly appear, — but he thought proper to levy a fine not only of that estate, but of the estates in reference to which no contract had been entered into with the Commissioners of

* 176 Chelsea Hospital, and which required * no attention whatever to be given to them. The result of that is this, — that the fine that was necessary to complete the title to the Chelsea Hospital Commissioners operated in law as a revocation of the devise to the widow of the whole of these premises, a parcel of which only had been sold to the commissioners. It turned out that the gentleman who had advised this large extent of the fine, the attorney, was himself the heir-at-law of the testator, though he states that he had very great doubts about it, and did not then believe that he was. I wish to put it in the strongest way for him, that he did not know and did not believe that he was the heir-at-law of the testator till he made that discovery, to say the least of it, shortly after the death of the testator; and that, therefore, this misfortune to the wife in losing this property was owing to his want of knowledge that the title of heir belonged to him, for a relation he must have known himself to be. The testator had been very bountiful in his exertions to serve this gentleman; and I do not mean to say that if the testator had had an opportunity of considering and reconsidering what would be the effect of this fine, I am far from being certain that he would not have left this property even to this gentleman himself. He states that he did not know or believe, or to that effect, that he was the heir-at-law of the testator, and that he did not know the effect of the fine would be such as

in point of law it has been ; and therefore that his notion is, that he is entitled to have this property under the circumstances of this case.

My Lords, I may be mistaken, or I may have forgotten perhaps, but I have taken great pains to refresh my mind upon this subject, though I have been very much absent from matters in courts of justice for somewhat now more than seven years: I have taken *great pains to look *.177 into this subject, and I do profess myself, if I had heard the cause in the year 1823, it would have been utterly impossible for me to direct an issue to a Court of Law, consistently with my habit, if possible, to save parties the expense of trials of issues, if the case afforded a clear ground of equity between the parties; and in this case I think such clear ground was afforded. I should have thought it my duty, upon the principle which I am now about to state, at once to have said, “ Whether you meant fraud, whether you knew that you were the heir-at-law of the testator or not, you who have been wanting in what I conceive to be the duty of an attorney, if it happens that you get an advantage by that neglect, you shall not hold that advantage, but you shall be a trustee of the property for the benefit of that person who would have remained entitled to it if you had known what you ought as an attorney to have known; and not knowing it, because you ought to have known it, you shall not take advantage of your own ignorance;” for I carry it so far, “you shall not take advantage of your own ignorance.” It is too dangerous to the interests of mankind, that those who are bound to advise, and who being bound to advise ought to be able to give sound and sufficient advice, — it is too dangerous to allow that they shall ever take advantage of their own ignorance, of their own professional ignorance, to the prejudice of others.

My Lords, this principle I find laid down by Lord HARDWICKE in different cases, (a) and it is exceedingly well illustrated in the case stated from Ireland. I have in my posses-

(a) *Barnesley v. Powell*, 1 Ves. 284.

An attorney is bound to give sufficient advice to his client; and if any advantage or property come to him by his ignorance or the neglect of his duty, he shall be a trustee thereof for the benefit of the person who would be entitled there to if the attorney had known and done his duty.

sion at this moment the manuscript of that decree,
 * 178 which was quoted at the bar. * I am sure it is genuine: I know the handwriting of Sir ANTHONY HAET, the then Lord Chancellor of Ireland. This manuscript which I now have shows the diligence and accurate attention which he gave to the subject, having corrected and recorrected it, in order that the principle might be understood upon which the decree was made. My Lords, that case was this: A gentleman at the bar, who appeared by the former transactions between the testator and himself to have been a very intimate friend of the testator, made himself executor to the testator under these circumstances: By the law at that time, if there was no personal estate given in legacies to other persons, or even if there were legacies given to other persons, the executor, by his appointment as such executor, would have taken the whole of the residue of the personal estate. It was not the intention of that testator to give this learned counsellor any thing more than the office of executor; but he insisted that, having got the office of executor, he was entitled to the residue of the personal estate; and it turned out as a matter of fact, and the case was in this respect I believe perfectly honest, that he was not aware of the doctrine at the time that he made the will which appointed him executor, that he would be entitled to this personal estate. But what said the Court to that? The Court said, "That is what you ought to have known; you ought to have known it, and you shall not take for your own benefit that which you have derived from your professional ignorance;" and the consequence was, that he was declared to be a trustee, for the next of kin, of the residue of the personal estate; and I humbly think this appellant is a trustee of that part of the real estate with reference to which there was no occasion whatever, in
 * 179 order to * carry the contract with the Commissioners of Chelsea Hospital into effect, to levy any fine.

This gentleman, I see, alleges that he did not know the testator had made a will; but he could not but know, considering the proposition I have stated, that if the testator had made a will, devising all the other estates to his widow—that if he levied a fine to the extent that this fine was levied,

it must revoke his will. I say it was his duty to have asked the testator whether he had made a will, and not to have gone beyond the necessity that arose in that case for the purpose of making the title to the commissioners' complete, and of carrying that contract into effect; and it is as clear as the sun at noonday, at least we know nothing to the contrary, and it is but fair to say it, looking at the whole of his answer, that if he had known that the estate had been devised to the lady who had become General Wilford's widow, he would not have levied a fine of that estate, unless under a deed that should give the same effect as to her interest as she would have taken under the will. I have no hesitation, therefore, in saying that if I had heard this cause originally, I should not have directed any issues, because there is a principle of equity that considers that if there is negligence it is quite enough; but instead of that, two issues were directed, one of those issues was found for Mr. Bulkley, but the other was found against him, and that certainly does in the finding impute to him that he fraudulently omitted to do so and so.

It is the duty of an attorney employed to levy a fine to ask his client whether he has made his will.

My Lords, I should feel at my time of life, what I thank God I do not feel, deep regret, if I had ever been too quick in charging anybody with fraud. I hope I never have been; but in the present case I must go the length of saying that I cannot expound * that declaration which was * 180 made to Mr. Bicknell by this gentleman, Mr. Bulkley, — I cannot possibly expound that, but by forming at least a conjecture that my mind does not easily get rid of, that this gentleman had at least a conviction in his mind that it was better for him to take the chance of proving himself to be the heir-at-law after the death of this testator, than to take the chance of his deriving a benefit from this property under the will. And really, when one attends to the argument of so able, acute, and learned a counsel as *Sir E. Sugden*, and when you have nothing to meet that which is the natural effect of the declaration made at a casual meeting of Mr. Bicknell and Mr. Bulkley, — when you have nothing but the reasoning that you heard from below the bar upon the subject, I cannot but persuade myself that *Sir E. Sugden* himself thought that

— that they will all know, particularly with regard to that part of the profession to which the appellant belongs, that though there is no body of men that are more honourable in the discharge of those delicate duties that are cast

* 183 * upon them than the generality of them are, yet, notwithstanding I am satisfied of that, still I hope that the observation made by my noble friend will have its due impression upon them, that there is an established principle in the

Courts of Equity that no professional man can take advantage of his ignorance, of his negligence, much less of his fraud. If there were not such a principle recognized by Courts of Equity, they would ill deserve that name.

It is a principle of equity that no professional man shall take advantage of his ignorance or negligence.

There are two cases to which your Lordships' attention has been called at the bar, which recognize that principle. In the first of them, reported by the elder Vesey, (a) it is distinctly laid down as a principle, that no party can take advantage even of his ignorance, or of his negligence, and still less undoubtedly of his fraud. Still more clearly is it laid down in the case upon which my noble friend has commented, — that case decided by the late excellent and learned Lord Chancellor HART, in Ireland.

My Lords, let us see whether the appellant in this case is not seeking to take advantage even of his ignorance, or whether he is not attempting to avail himself of his fraud. He clearly knew that he was a relation, for that is admitted; and he believed more, for he has admitted that it was probable he was the heir presumptive of the deceased. Under these circumstances he was called upon to levy a fine of a portion of the estate. At the time he levied the fine he must have known, and I will prove that presently, that there was a will, and that the fine would revoke the will. But

An attorney should know that a fine would revoke a will, and he as well as a barrister is bound to know the effect of acts which he is often employed to perform.

whether he knew it or not, he ought to have known it, and every attorney ought to know that a fine would revoke the will. I say this upon authority, — an authority that will ever remain unquestioned * in Westminster Hall, — the

* 184 authority of Lord TENTERDEN, who distinctly stated it

(a) Barnesley v. Powell, 1 Ves. 284.

in the direction he gave the jury in this case. I say it also upon the authority of Sir ANTHONY HART, who distinctly stated that a barrister, — and I know of no distinction between a barrister and an attorney in this case, except that the latter is more frequently called upon to consider cases of this sort than a barrister, — that a barrister was bound to know that the making a man an executor to a will, giving him no legacy, put under his control and power, for his own use, all the residue of the property of the testator not disposed of. Upon the authority of both these learned persons I say, and if there is any difference between the case of a man by his will making another an executor, thereby giving him the residue of his personal property, — if there is any difference between that and this case, this case of levying a fine and revoking the will by which this testator disposed of his property, is a much stronger case, because a man must be very ignorant indeed not to know that making a different disposition of the property does revoke the disposition already made. Now that being the case, is it possible to say upon what is stated in the bill, and admitted in the answer, that your Lordships would not be allowing this gentleman to take advantage of his ignorance, or, as the jury have said, of his fraud, by allowing this testator to levy fine, without informing him of the effect that that fine would have upon the will? Was not it his duty to have inquired of his client and relation, if he did not know, whether he had made a will, and to tell him that the effect of what he was doing would be completely to do away with the effect of the will?

It is not necessary to decide in this case, though I should have no difficulty in coming to a decision * upon * 185 the point, whether or not, supposing this gentleman to have known he was the heir, and to have intended to take advantage of it, and that a devisee under the will had been injured by it, — whether an action would not have lain against him for negligence. But there is a great difference between recovering compensation for negligence, and allowing a man, upon his own oath, to take advantage of it. This is not a case to recover compensation for a wrong done; but what your Lordships are called upon to say is, whether you will

allow this gentleman to take advantage of the wrong he has done, either through ignorance or fraud. I say, therefore, upon the facts as they appear upon the bill and answer, I agree with my noble friend, though I am not so conversant with equity as he is; but after the reasons he has given, which would not perhaps have occurred to myself, I should have said, this cause is at an end; there is no need of an issue. It would render all property in this country insecure, considering the confidence reposed in attorneys, if in such cases you were to allow an attorney to take advantage of his own misconduct. But the learned Judge in the Court below thought proper to direct an issue; and I am not sorry that he did, except that the parties have been put, in my opinion, to an unnecessary expense; for we decide this case more satisfactorily from the facts elicited from the different witnesses, by being examined before a jury; and we have the advantage of the opinion of Lord TENTERDEN upon the law of the case, as far as regards the obligation upon an attorney to bring a competent knowledge to the discharge of his duty; and he does not bring a competent knowledge to the discharge of his duty, unless he knows the effect of a fine in regard to the revocation * of a will. But there were two issues: 1st, whether this gentleman did fraudulently levy a fine with a view to his own interest? The jury have properly found that he did not, because there is not the least evidence that the fine was levied with that intent. But there is another issue, whether, supposing the fine not improperly levied, this gentleman did not fraudulently conceal from the general that the fine would have the effect of revoking the will? They have found the fraud, and I think they have done rightly. I think they could have come to no other conclusion upon the facts in the case, for these reasons. In the first place, there is the testimony of the young woman of the name of Wilcox, who speaks of the appellant coming to the house whilst the general was lying dead, and telling her and her mother that the general had omitted to give them any legacy in his will, as he had promised; but that the will was void; that he should be in possession, as heir-at-law, and that he would make up to them for the negligence of the general,

and, in fact, provide for the whole family. My Lords, strong observations have been made by *Sir Edward Sugden* as to the improbability of that evidence. I do not go along with him. The only ground that makes it improbable is, that the mother does not hear it or recollect any such circumstance occurring. We do not know the age of this woman, or whether she is liable to the infirmity of deafness. She might not be able to speak to it, either from age or deafness; if from age she might have forgotten it; or if from deafness, she might not have heard what the daughter did hear. But I cannot say I think this an improbable story. A person in the situation of this appellant would be very likely to reconcile himself as well as he could * with the different servants * 187 in the family: there were many ways in which they might do him great injury, and many ways in which they might render him service. It was not at all improbable, in my opinion, that a man who had concealed this important fact, so operating upon the interests of the family, should attempt to obtain the favour of the servants in supporting and carrying into effect that which he had done. I think, therefore, it is far from being improbable, from the experience I have gained in courts of justice. I have known many instances of persons who have improperly interfered in making and revoking wills, and who have made use of the artifices imputed to this person to support the schemes they have undertaken in regard to making or revoking a will.

But is not this testimony of the woman supported by the testimony of Mr. Bicknell? Nay, you do not want the testimony of this woman. Mr. Bicknell proves the whole case. Mr. Bicknell proves that in the lifetime of the general the appellant must have known there was a will, and must have known that the fine would have the effect of revoking that will. I say Mr. Bicknell proves that, because what is the conversation? He is told, "The world finds fault with you for not telling the general the effect of the fine upon his will." Supposing his present case to be true, his answer would have been, "I knew nothing of it; and if there was a will, I did not know that the fine would revoke it." Is that his answer? No; the answer proves his knowledge of the

will, and that he had that knowledge while the general was alive; for he says, "Why should I put a sword in the general's hand to cut my throat?" That means, "If I * 188 had told the general that the fine would have * revoked the will, he would have made another will." I say that this witness most distinctly proves that this gentleman did know of the existence of this will, and did know the effect of the fine with regard to this will. How is this met? It is met by the testimony of the witnesses, who say that the general being ill upon the morning he was to attend Lord Chief Justice DALLAS to levy this fine, the appellant requested him not to go. It is not necessary that your Lordships should come to a conclusion that this man is a brute, or that he had not those feelings that a rational man ought to have, in order to decide this question. If he saw the general so ill, as it is represented he was, it was natural that he should have said, and he must have been a monster if he had not said, "Do not go this morning; you will have other opportunities. You do not know what the consequence may be." Is that a circumstance to be weighed against the evidence, taking it in the best point of view for the appellant? But, my Lords, there is another point of view in which that may be taken; he might have thought that the taking before Lord Chief Justice DALLAS a person in that state, when coming into the presence of such a person, the matter might have been explained, and his projects have been disappointed.

There was examined in the Court of Chancery a gentleman of the name of Wilmot; that gentleman was not called before the jury, where he could have been cross-examined. I do not mean to say any thing disrespectful of him, but it is probable that Mr. Wilmot might have told the jury in what manner it was the appellant expressed his ignorance of the effect of this fine; but Mr. Wilmot was not called. It is said he was * 189 not called because Sir JAMES SCARLETT was of * opinion that his evidence ought not to be received. I agree with Sir JAMES SCARLETT; but, agreeing with Sir JAMES SCARLETT, I would have tendered that witness, and have seen whether he was objected to; as he was not objected to in the Court of Chancery, and as the rules of evidence are the same

in Chancery as in Courts of Common Law, I do not think he would have been rejected in a Court of Law, but he ought to have tendered that evidence. That is wanting; but with the evidence to which I have adverted, the jury could come to no other conclusion than that which they expressed, and which is, not that this concealment was through ignorance, but through fraud. I confess, if Mr. Bicknell's evidence be true, and no doubt it is true, I think the jury have come to a right conclusion, and that we cannot speak of this transaction in any other terms than those which are recorded in the verdict of the jury.

My Lords, this is an important case to the parties themselves, but it is of infinitely greater importance to the public; and if your Lordships should be disposed to affirm the recommendation of my noble friend, and of the humble individual now addressing you, perhaps imperfectly, after the learning you have heard from my noble friend, you will give security to property; and it will tend to inform every one that if an attorney should, with a view to his own particular interest, be induced to do acts injurious to the property of others, he is not to derive advantage from them. Therefore, concurring with my noble friend, and as he has not made any motion to your Lordships, following up the speech he has made with so much ability on these great questions of law and equity, I humbly move your Lordships that this appeal be dismissed with costs.

* I find there will be no occasion for any taxation of * 190 costs. I humbly move your Lordships to give 50*l.* costs, and then the judgment will take effect immediately. (a)

Judgment below affirmed, with 50*l.* costs.

(a) The Lord Chancellor, as also Lord LYNDEHURST, declined to take any part in the adjudication of this case, both having been formerly counsel for the parties respectively, in the action of ejectment, and in the subsequent motion in the Court of King's Bench for a new trial of that action. See *Denn v. Wilford*, 2 C. & P. 173, 175; S. C., 8 Dowl. & Ryl. 549.

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* IN RE WESTMINSTER BANK.

1834.

In the Matter of the LONDON AND WESTMINSTER BANK.

Opinions of the Judges. Practice.

The Judges will decline answering a question put by the House of Lords, if that question is not confined to the strict legal construction of existing laws.¹

July 12.

CERTAIN persons having united themselves together under the name of the London and Westminster Bank Company, applied to Parliament for a bill to incorporate them under that name. The bill passed the House of Commons, and on being brought up to this House was read as a matter of course a first time. When it stood for a second reading it was moved and agreed to, that counsel should be heard at the bar of the House on the subject of the bill. It was then moved and agreed to, that the Judges be ordered to attend the House. The order was dated on Monday the 16th June, 1834, and was in the following terms :—

* 192 * “ Ordered, by the Lords Spiritual and Temporal, in Parliament assembled, that the bill intituled ‘ An Act to enable the company, called the London and Westminster Bank, to sue and be sued in the name of one of the directors or of the trustees, or any of them, or of the manager or managers, or any of them, of the said company,’ be taken into the consideration of the learned Judges, on Friday next, on this question : ‘ Are the provisions of this bill inconsistent with the Bank of England’s rights, as secured to it under the following Acts : 5 Will. & M. c. 20 ; 8 & 9 Will. & M. c. 20 ; 6 Ann. c. 22 ; 15 Geo. 2, c. 13 ; 21 Geo. 3, c. 60 ; 39 & 40 Geo. 3, c. 28 ; and 3 & 4 Will. 4, c. 98 ? ’ ”

On Friday, the 20th, the Judges attended ; Lord Wynford

¹ See M’Naghten’s Case, 10 Cl. & Fin. 200.

sat as Deputy Speaker. The Lords present, besides his Lordship, were the Duke of Cumberland, the Marquis of Bute, the Marquis of Bristol, the Earl of Stradbroke, Lord Bexley, and the Bishop of Hereford.

The Judges were Lord Chief Justice TINDAL, Mr. Justice PARK, Mr. Justice LITTLEDALE, Mr. Justice VAUGHAN, Mr. Baron PARKE, Mr. Justice TAUNTON, Mr. Justice PATTESON, Mr. Baron ALDERSON, Mr. Baron BOLLAND, and Mr. Justice WILLIAMS.

Mr. Harrison, *Sir E. B. Sugden*, and *Mr. Law*, appeared on behalf of the Bank of England; and *Mr. Follett*, *Mr. Wrangham*, and *Mr. Shee*, for the petitioners in support of the bill.

Lord Wynford, interrupting *Mr. Harrison* in the course of his argument, said, that the Judges had communicated to him that they felt some difficulty as to the possibility of their answering the question which * had been sub- * 193 mitted to them by their Lordships. He moved that they should retire, for the purpose of considering whether they could answer the question.

The Judges having retired, remained absent above three-quarters of an hour, when

Lord Chief Justice TINDAL, on their return, said: "His Majesty's Judges, after considering the question which has been proposed to them, find it proposed in terms which render it doubtful whether it is a question confined to the strict legal construction of existing Acts of Parliament; and they therefore, with great deference and respect to your Lordships, request to be excused from giving an answer."

Lord Wynford intimated that he had before thought it doubtful whether the Judges could answer the question. (a)

[The further consideration of the bill was then adjourned.]

(a) Mich. 27 Geo. 2. A question having been started, on occasion of the late Act of Parliament concerning the naturalization of the Jews, which Act was repealed this session, whether Jews are entitled to purchase and hold lands in England, Lord TEMPLE, after the repeal of the

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* APPEAL

FROM THE COURT OF CHANCERY.

LANGSTON AND OTHERS *v.* LANGSTON AND OTHERS.

1834.

| | | |
|--|---|---------------------------------|
| JULIA LANGSTON, an Infant, by her next Friend ; MARIA SARAH LANGSTON, CHARLES BARTER the Elder, and Wife ; and CHARLES BARTER the Younger, an Infant, by his next Friend | } | <i>Appellants.</i> |
| JAMES HAUGHTON LANGSTON, SIR CHARLES MORICE POLE, Bart., and HAUGHTON FAR- MER OKEOVER | } | <i>Respondents.¹</i> |

Will. Construction. The Words "all and every other." Implication.

J. L. devised his manors and hereditaments to trustees upon trust to convey the same to the use of J. H. L. (his eldest son) for life; with remainder to trustees to preserve contingent remainders; with remainder to the use of the second, third, fourth, fifth, and all and every other the son and sons of the body of J. H. L., severally and successively in seniority of age and priority of birth, in tail male; remainder to the use of devisor's second and other sons successively in tail male; remainder to

Act, moved in the House of Lords that some method might be taken to ascertain this question, and that for this purpose the Judges might be desired to attend and give their opinions upon it; which was opposed, and the motion rejected, for many reasons, but particularly because the Judges are not obliged to give their opinions to the House upon such extra-judicial questions, and where no bill is depending; and the Duke of Argyle mentioned a case in Queen Anne's time, where such a question being put to the judges, Lord Chief Justice Holt, in the name of himself and the rest, insisted that they were not obliged to give their opinions on any such question; and his objections thereto were allowed by the House. — Mr. Coxe's MSS. E. E.

¹ S. C., 8 Bligh N. S. 167.

the use of J. H. L.'s first, second, third, fourth, fifth, and all and every other daughter and daughters successively, in tail general; remainder to the use of devisor's eldest daughter, M. S. L. for life; remainder to trustees to preserve, &c.; remainder to the use of the first, second, third, fourth, fifth, and all and every other son of M. S. L. successively, in tail male; remainder to her first, second, and other daughters successively, in tail general; with divers other like remainders to the devisor's other daughters and their issue, and various intermediate terms in trust.

There was no express limitation to J. H. L.'s first son, nor any provision for him made or referred to in the will; but the trust of the first term directed to be contained in the settlement to be made by the trustees was declared to be, in case there should be no son of J. H. L., for raising portions for his daughters, except an eldest or only daughter; and the trusts of the other terms were to be for raising portions * for * 195 the younger children of the successive tenants for life, in case there should be no issue of the body of J. H. L.; and a power was directed by the devisor to be inserted in the settlement to enable J. H. L. to charge the devised estates with portions for his children other than an eldest or only son. *Held*, that the first son of J. H. L. was entitled to have an estate tail in the devised manors and hereditaments, expectant on the death of his father, limited to him in the conveyance directed to be made by the trustees.¹

May 5, June 9.

THE decree under appeal in this case was made in a suit instituted for the purpose of establishing a will, which, as far as it is material to set it forth here, was to the following effect:—

“John Langston, late of Sarsden House, in the county of Oxford, Esquire, being seised in fee of considerable estates in Middlesex and Oxfordshire, and being also seised to him and his heirs of several copyhold estates in the same counties, duly made and published his will in writing, bearing date the 28th of July, 1801, and signed and attested in the manner by law required to pass freehold estates, and he thereby devised all

¹ See 1 Jarman Wills (3d Eng. ed), 382, 460–462; 2 ib. 202, 203; *Grey v. Pearson*, 6 H. L. Cas. 90, 91; *Abbott v. Middleton, Ricketts v. Carpenter*, 7 H. L. Cas. 72, 73; *Surtees v. Hopkinson*, L. R. 4 Eq. 103; *In re Thompson's Trusts*, L. R. 11 Eq. 146; *Hart v. Tulk*, 2 De G., M. & G. 300, 310, 311; *Key v. Key*, 4 De G., M. & G. 73; *Ware v. Watson*, 7 De G., M. & G. 248, 259; *Bryden v. Willett*, L. R. 7 Eq. 472, 475.

his freehold and copyhold manors, messuages, farms, lands, tenements, tithes, and hereditaments, situate in the said several counties, or elsewhere in England (except his shares in the New River Company), unto J. P. Bastard, Esquire, J. W. Hope, Esquire, and C. M. Pole, Esquire (now Sir Charles Morice Pole, Bart., one of the respondents), their heirs and assigns, upon trust during the minority of the testator's son, the respondent James Haughton Langston (who was then about the age of five years), to receive the rents and profits thereof, and to dispose of the same for the purposes in the said will mentioned: And upon this further trust, that when the

* 196 said J. H. Langston should attain the age * of twenty-one years the said trustees or the survivors or survivor of them, or the heirs or assigns of such survivor, should by good and sufficient conveyances and assurances in the law, convey, settle, and assure the same manors, messuages, &c., and hereditaments, in such manner as that the same should continue and be for and upon the several uses, trusts, and purposes, and subject to the several powers, &c., and declarations therein and partly hereinafter mentioned and declared of and concerning the same, or such of them as should be then subsisting or capable of taking effect; that is to say, to the use of the said testator's said son J. H. Langston, for life; and from and after the determination of that estate, to the use of trustees (to be named in such settlement) and their heirs, in trust to preserve the contingent uses and estates to be thereafter limited; with remainder to the use of the second, third, fourth, fifth, and all and every other the son and sons of the body of the said J. H. Langston, lawfully to be begotten, severally, successively and in remainder one after another as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing; the elder of such sons and the heirs male of his body to be always preferred and to take before the younger of such son and sons, and the heirs male of his and their body and bodies issuing."

The question for decision was whether, under the terms of
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this limitation, the first son of James Haughton Langston, who, for the purpose of raising the question, was supposed to have two sons, took any and what estate in the devised manors and hereditaments.

* The will continued, after the above limitation, * 197
 “ With remainder to the use of other trustees to be named in the said settlement, their executors, administrators, and assigns, for the term of 500 years, upon the trusts and for the intents and purposes thereafter mentioned ; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of the said J. H. Langston severally, successively, and in remainder, in tail general ; and in default of such issue, to the use of other trustees to be named in the said settlement for ninety-nine years, upon the trusts thereafter mentioned ; with remainder to the use of the testator’s eldest daughter, the appellant Maria Sarah Langston, for life, with remainder to trustees to preserve, &c. ; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the testator’s said daughter, severally and successively and in remainder in tail male ; and for default of such issue, to the use of other trustees to be named in the said settlement for 600 years, upon trusts after mentioned ; with remainder to the use of testator’s said daughter’s first, second, third, fourth, fifth, and all and every other her daughter and daughters, severally, successively, and in remainder in tail general.”

The testator, after directing by his said will like limitations in remainder to be contained in the said executory settlement for each of his four younger daughters, Elizabeth Catherine, Caroline, Agatha Maria Sophia, and Henrietta Maria, for life, severally and successively (with remainders interposed to trustees to preserve, &c.), with like remainders in tail male and tail general to their respective children, with remainder to his sixth and other daughters thereafter to be born, successively in tail general, with ultimate * remainder * 198
 to his sister, Mrs. Cazalet, in fee, proceeded to direct the trusts of the above-mentioned terms of 500 years and 99 years and 600 years, and also of five other terms of 700

Maria Sarah Langston, Mr. and Mrs. Barter, and their said infant son, who was then the first tenant in tail *in esse* of the manors and hereditaments devised in trust to be settled as aforesaid.

The bill, after stating the will more at large, and to the purport and effect hereinbefore stated, charged that it was the testator's intention that his will should contain a direction that the settlement so directed to be made as aforesaid should contain a limitation to James Haughton Langston's first son in tail male, immediately after the limitation to trustees during his life to preserve contingent remainders, and immediately before the limitation to his second son; and that the testator accordingly gave instructions to his solicitor to prepare a will containing a direction to insert such a limitation in the settlement so directed to be made; and that in pursuance of such instructions a draft of his will was prepared, and such draft contained a direction that such a limitation should be inserted in the said settlement, but that in the engrossment of the will such direction was omitted to be inserted by the mistake of the person who engrossed the will; however, it was submitted that the said will contained within itself sufficient evidence of the testator's intention being that the settlement so

* 204 directed to be made as * aforesaid should contain such a limitation in favour of the respondent's eldest son in tail male. The bill prayed that the said will and codicils might be established, and the trusts thereof (so far as respected the settlement and conveyance of the manors and hereditaments of the said testator devised as aforesaid to the said trustees) might be carried into execution by a settlement and conveyance to be made by the said trustees of the same manors and hereditaments, to the uses, upon the trusts, and for the intents and purposes, and subject to the powers and declarations to, upon, for, and subject to which the same were by the said will directed to be settled and conveyed, or as near thereto as the deaths of persons and circumstances of the case would permit; and especially that, in making such settlement and conveyance, a limitation might be inserted therein whereby the said manors and hereditaments might be limited, settled, and assured to the use of J. H. Langston's first son in tail

male in remainder, immediately after the limitation to the use of trustees during the life of J. H. Langston to preserve contingent remainders, and immediately before the limitation to the use of his second son in tail male.

The defendants appeared and put in their answers, stating (except Charles Barter the younger) their belief that the testator intended that his will should contain the direction referred to, in favour of J. H. Langston's first son in tail male.

The cause having come to be heard in February, 1826, before the late Lord GIFFORD, then Master of the Rolls, a case was ordered to be sent for the opinion of the Court of King's Bench; and in pursuance of the order so made, a case was prepared containing a statement of the limitations of the said will in the * form of legal limitations, and * 205 a general statement of some other parts thereof, and assuming and stating as a fact that J. H. Langston had lawful issue two sons, Henry his first-born son, and Edward his second son; and the question proposed was, "whether the said Henry, the first son of the testator's son J. H. Langston, takes any estate under the said will." That case was argued before Mr. Justice BAYLEY, Mr. Justice HOLROYD, and Mr. Justice LITTLEDALE, three of the Justices of the Court of King's Bench, in the absence of the Lord Chief Justice; and they by certificate, dated the 30th of April, 1827, certified their opinion to be that "the said Henry Langston, the first son of the testator's son, J. H. Langston, did not take any estate under the said will." (See *Langston v. Pole and others*, 9 Dowl. & Ryl. 298, where the case sent is fully set forth.)

The cause having come to be heard for further directions on that certificate, in March, 1828, before Sir JOHN LEACH, then Master of the Rolls, his Honor ordered a case for the opinion of the Court of Common Pleas. A case was accordingly made for the opinion of that Court, stating the limitations of the will as legal limitations, and setting forth other parts of the said will more fully than had been stated in the former case; and likewise assuming as a fact that the said J. H. Langston had two sons, Henry the first, and Edward the second born son; and the question proposed was, "whether the said Henry Langston, the first son of the said testator's

son, J. H. Langston, takes any and what estate under the said will." That case was argued before the four Justices of the Court of Common Pleas; namely, Lord Chief Justice

BEST, Mr. Justice PARK, Mr. Justice BURROUGH, and

* 206 Mr. Justice GASELEE; and they, by * their certificate, dated the 28th of November, 1828, certified their opinion that the said Henry Langston, the first son of the testator's son, J. H. Langston, takes an estate in tail male under the said will, expectant on the death of his father, the said J. H. Langston. (See *Langston v. Pole and others*, 5 Bing. 228, where that second case is fully set forth; and S. C., 2 Moore & P. 490.)

The cause came to be heard before the Master of the Rolls for further directions, upon the last-mentioned certificate; and his Honor by his decree, bearing date the 28th of July, 1829, ordered that the said certificate be confirmed, and he declared accordingly that the said will ought to be established and the several trusts thereof carried into execution, &c., according to the prayer of the bill. (See *Langston v. Pole*, 1 Tamlyn, 119, 129, where the difference between the two cases sent to the Courts of Law is pointed out.)

Shortly after the filing of the said bill, and before any further proceedings were had in the cause (viz., in the month of July, 1824), James Haughton Langston married the Hon. Julia F. Moreton, and since the last-mentioned decree the appellant, Julia Langston, was born of that marriage; and she becoming the first tenant in tail *in esse* of the devised estates directed by the said will to be settled as aforesaid, was made a party defendant to the suit, by a supplemental bill filed by the respondent J. H. Langston, in February, 1830, praying against her and the other defendants the benefit of the former proceedings and decree. The cause was heard on the supplemental suit on the 5th of March following, by the Master of the Rolls, who made a decree therein at that date, according to the prayer of the said supplemental bill * and in the terms, or to the purport and effect, of his former decree.

His Honor, in pronouncing these decrees, in conformity with the certificate of the Court of Common Pleas and against

that of the Court of King's Bench, expressed an opinion that the trustees would be justified in not executing the settlement, without the sanction of the House of Lords as to which of the two decisions of the Courts of Law was the right decision.

The appeal was brought against so much of the decree of the 21st of July, 1829, as declared that the first son of the said testator's son, the respondent, J. H. Langston, would take an estate in tail male under the said will, expectant on the decease of his father, and that Sir Charles Morice Pole and Haughton Farmer Okeover, the surviving trustees of the said will, should convey and assure the said manors, messuages, lands, tenements, and hereditaments, so as to limit the same to the use of the first son of the respondent, J. H. Langston, in tail male in remainder, immediately after the limitation to the use of trustees during the life of the respondent; and also against so much of the said decree dated the 5th of March, 1830, as declared and directed to the same purport and effect.

Mr. Knight and *Mr. Wray*, for the appellants. — This case arises on the construction of the will of Mr. Langston; the principal appellant is the daughter of his only son; the respondents are that son and the surviving trustees of the will. The two Courts of Common Law certified contrary opinions, and the question now to be decided is which of those * Courts came to the right conclusion. The * 208 effect of what the Court of Common Pleas and the Master of the Rolls did, was to insert the word "first" before the word "second," so as to give an estate to the first son, which the Court of King's Bench declined to do. Lord GIFFORD settled the first case; Sir JOHN LEACH was dissatisfied with the certificate of the Court of King's Bench on that case, and sent to the Court of Common Pleas another case, which is longer, but there is no substantial difference between the two cases. Both cases and the arguments on them are reported, (*a*) but the reasons for the opinions of the respective Courts are not given.

(a) 9 Dowl. & Ryl. 298; 5 Bing. 228, and 2 Moore & P. 490.

[THE LORD CHANCELLOR. — No, they never have been given of late, in cases sent from the Court of Chancery. I have had communication with some of the learned Judges upon that subject, and I hope that practice, for the reasons I stated the last time (a) I was here, will be altered.

LORD WYNFORD. — I felt very desirous, when I was upon the Bench, that the reasons should be given; the other Judges differed with me, and I gave way.

THE LORD CHANCELLOR. — The reason the Judges give for withholding their reasons in those cases does not apply, namely, that they are afraid of their judgments being pulled to pieces in the Court of Chancery; whereas they will be pulled to pieces in a greater degree, for their reasons not appearing. Some of Lord KENYON's most valuable judgments, were judgments giving reasons for his opinion on such cases.]

There was no reason given for this judgment in any
* 209 Court; for the Master of the Rolls * merely confirmed the certificate of the Court of Common Pleas, expressing his opinion to be in conformity with it, (b) and suggested an appeal to this House; and there was no intermediate appeal to the Lord Chancellor.

The first part of the will is plain and clear; but the Judges who have had to consider the matter, other than the Judges of the Court of King's Bench, have conceived that the trusts created, and the language of the terms and of the powers, warranted them in adding to the words of the will; and, therefore, to prevent the testator from making an unusual, but not absurd disposition, they have made a will for him. The language by which the estate is given is this, "To the use of the second, third, fourth, fifth, and all and every other the son and sons of the body of him my said son, lawfully to be begotten, severally, successively and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son

(a) *Vide supra*, pp. 74, 80.

(b) 1 Tamlyn, 153.

and sons," &c. Both Lord GIFFORD and Sir JOHN LEACH were of opinion, in sending the cases, that the construction was to be that which would apply to immediate legal limitations; and that the circumstance of the limitations being contained in a will, which, vesting the legal fee in trustees, directed a settlement to be made by them, was not material to the construction of the will, and therefore deserved no consideration in the argument. Supposing, then, that there had been immediate devises, carrying with them the legal estate, your Lordships have to decide what would be the * proper construction of this will; whether you are to * 210 insert the word "first" before the word "second."

There is but one argument for that construction, — an argument entitled to great consideration, because five learned Judges in different Courts have adopted it, — the only argument is, that the testator in his will has created terms and given powers which would be capricious and unusual, unless the word "first" be inserted in the foregoing part of the will. Capricious and unusual they are admitted to be, but there is no absurdity in them. The language in the foregoing part of the will is clear and free from ambiguity. The words of the limitation referred to, if they stood alone, would not admit a doubt. If the will had stopped there, the Courts below must have held the second, third, fourth, and fifth son to take before a first, notwithstanding the words "all and every other," which must, according to their collocation, and to the ordinary use of the terms, mean all and every other after the second, third, fourth, and fifth son. To save the trouble of enumerating further, the testator says, "all and every other," that is, all and every other subsequent to the last enumerated. The only possible different construction from that would be, that the eldest son should come in after the fifth and before the sixth, if there was a sixth, which would be an extremely capricious and violent construction; whereas the construction, that "all and every other" mean those only that follow the fifth in the order of birth, is natural and orderly. But the Court of Common Pleas and the Master of the Rolls have placed the first son, not after the fifth, but before all the sons enumerated. As it probably did not occur to any

* 211 of the learned Judges below that, *if they did not place the first son at the head, he could be placed anywhere, it may not be necessary to trouble your Lordships with any argument on the placing him after the fifth, anticipating arguments which may not be made.

The part of the will on which alone a difficulty has arisen, is the language in which the terms and powers are created. The term of 500 years is, "Upon trust that in case there shall be no son of the body of my son, J. H. Langston, nor no future son of my body, or there being any such son or sons, if he and they shall all die without issue male before any of them shall attain the age of 21 years, and there shall be two or more daughters," then there is a provision for younger daughters. The question is, whether this trust involves any necessary implication of an intention to give an estate to the first son of J. H. Langston. There may have been reasons to induce the testator not to give portions if there were any sons; he had a right to restrict the conditions on which the portions should arise, and to say that if there were any sons there should be no portions for daughters. It may be urged as unreasonable that a portion should not be payable, if there was any son, unless that son was found to be included in the limitations of the estate; but still no necessary implication arises; all that can be said is, that it is a capricious condition; it is only a provision of an unusual nature, a delay of portions or a restriction upon the portions for which a reason cannot be now given, but for which the testator may have had a sufficient reason; and caprice is a sufficient reason for a testator to act upon, but has it ever been held before that that is a test of judicial decision? Or can it

be safely held, that because one provision in a will is
* 212 capricious * when compared with another, you must therefore alter the other in order to make the second provision not capricious?

The trusts of the terms and the powers are such as one would naturally expect to find in a will providing for a first son; that is admitted, and in that consists the whole of the argument of the respondents, who say, it will be better if your Lordships will make the provisions for C. and D. more

consistent with what is reasonable, by altering the first provision. But that there may be some inconsistency in the subsequent directions of the testator, is no reason for altering language, plain, clear, and intelligible, in the first part of a will. (a) The Master of the Rolls and the Court of Common Pleas have in effect said, "you cannot reasonably impute to a testator the intention of leaving in a certain event part of his family unprovided with portions;" in other words, you cannot impute to him a capricious restriction upon the manner in which the portions are to arise.

[THE LORD CHANCELLOR.—Is there not a case in which "second" was read "first;" an estate to A. and to his other sons?]

The cases of *Doe v. Hallett* and *Clements v. Paske* (b) were cases of necessary implication; no case has gone the length of this; here is in one part of the will a provision for A. B. clear and intelligible, no ambiguity whatever, and it is a case in which, if the will had stopped there, no one could have entertained a doubt on it. In another part of the will the testator has made provisions for other persons, which, upon one view of the case, are capricious; but suppose he had said, "I choose the second son; I know I have omitted the first; I know I have *begun with the * 213 second, and yet I choose that portions shall be so and so limited."

[LORD PLUNKETT.—Are you quite right in saying that the first words are perfectly clear and free from ambiguity, in which the limitations are made to the second, third, and other sons?]

THE LORD CHANCELLOR.—Take the words "other son."]

The word "other" is to be understood according to the literal and common sense, and legal construction; it may

(a) *Vide supra*, *Thornhill v. Hall*, pp. 36, 38, 39.

(b) 1 M. & Sel. 124, 130; *vide infra*, p. 230.

include the first, only that the testator would so bring in the first out of his order.

[THE LORD CHANCELLOR. — Then that would be a capricious thing in a testator to express himself in that way; for if you admit that he is brought in after the youngest, you are taking liberties with the literal meaning of the words.]

The second, third, fourth and fifth must come before the first; they are mentioned first. They must be taken in order; the first is not mentioned, and he can be brought in only, if at all, under the word “other.”

[THE LORD CHANCELLOR. — We take it for granted that it is not in the case, or it would have appeared if there was any other settlement.]

It does not appear one way or the other; it is sufficient for the purpose of our argument that it may have been so. Supposing your Lordships were to include the first under the word “other,” and there were ten sons, where could your Lordships place him? next after the tenth, or next after the fifth, or the sixth? It would be difficult to come to that conclusion against the plain import of the word “other,” which, after an enumeration of several successive sons, must be taken to mean other younger, subsequent in birth to the last enumerated. The testator has introduced into the will provisions which are inconsistent with placing the first son either sixth, or seventh, or last; the trusts of the terms
 * 214 and the * powers are irreconcilable with that construction, and the only construction consistent with them is to place the first son first, which is prohibited by the terms in which the testator has expressed himself.

No case has gone to the dangerous length to which it is sought to carry this. The case of *Doe v. Hallett* (a) does not apply. There John James devised his manors and hereditaments to trustees, to the use of his wife for life; and after her death, “to the use of William Head, only surviving son of Sir

(a) 1 M. & Sel. 124.

Thomas Head, until he should attain the age of twenty-four years, and after twenty-four, then to the use of the said William Head for life; and after the determination of that estate, &c., to the use of trustees, to preserve contingent remainders; and immediately after the decease of William Head, to the use of the first, second, third, and of all and every the other son and sons of the body of William Head, according to their priority of birth, and the heirs male of the body of such first and other sons respectively issuing; and in default of such issue, to the use of the first, second, and of all and every other son and sons of Sir Thomas Head, lawfully to be begotten, according to their priority of birth, and the heirs male of the body of such first and other sons respectively issuing; and in default of such issue, over." The fact was, that there was a second son of Sir Thomas Head, born before the date of the will, and he was personally known to the testator; and it was decided that that second son was capable of taking, notwithstanding the words "lawfully to be begotten," on the ground of the misdescription of the first son, and on the rule that the words "begotten" and "to be begotten" are of the same import in law. Lord Ellenborough, in giving * his opinion on that case, after ascribing the difficulty * 215 of the question to the blunder of the testator and the neglect of his attorney, said, "I disclaim all considerations of that sort in the present instance, and am willing that the conjoint omissions of the testator and his attorney should have full legal effect. The will must stand or fall according to the language of it; but I think that language will not, on a fair construction of it, disappoint the intention of the testator. The first mistake is in the description of William Head as the only surviving son; for there was another son living, of the age of nine years; but how does that mistake affect or control the subsequent limitation? That limitation is to the use of the first, second, and all and every other son and sons, &c., that is, who at the death of William Head would become first son. Then came the words 'lawfully to be begotten,' which would give rise to a material question, if it had not been settled by a series of authorities, and impeached by none, that 'to be begotten' means 'begotten,' embracing all those whom

the parent shall have begotten, *quos procreaverit*." The case of *Clements v. Paske* is cited in that case, and nowhere else reported. That was also a case sent from the Court of Chancery to the Court of King's Bench. It was a devise to A. for life, and after his decease, to the first and eldest son of the body of the testator's nephew, lawfully issuing or issued; and for default of such issue, then likewise to the second, third, and every other son of his nephew successively and in remainder, as they should be in seniority of age, and the several and respective heirs male of the body of every such son or sons successively in tail male, &c. It was there decided

* 216 that the nephew took an estate tail by implication, * in order to effect the general intent, and let in the descendants of his first son. In this case there is not any general intent. The decision in that case was not that the words gave an estate to the eldest son, but that they gave an estate tail to the nephew; the Judges made him tenant for life by the will, in order to let in the intention which they collected from that will. It is not suggested that any such construction can be put on the will of Mr. Langston. The case of *Hay v. The Earl of Coventry* (a) is well calculated for a test of the rule of construction. There Sir Robert Worsley being seised in fee devised his hereditaments upon trust to raise the sum of 5000*l.* for his granddaughter, Lady Frances Carteret, and subject thereto, upon trust that the trustees should stand seised of the premises to the uses of his grandson Robert Lord Carteret for life, remainder to trustees to preserve contingent remainders, remainder to first and other sons of Lord Carteret in tail male, remainder to Lady Frances Carteret for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of Lady Frances in tail male; and in default of such issue, to all and every the daughter and daughters of the body of Lady Frances Carteret, as tenants in common, and not as joint tenants; and in default of such issue, to the use and behoof of his own right heirs for ever. Lord KENYON, in stating his opinion that the daughter of Lady Frances Carteret took an estate for life only, said, "The general rule as laid down in the books,

(a) 3 T. R. 83.

and on which alone Courts can with any safety proceed in decisions of questions of this kind, is to collect the testator's intention from the words he has used in his will, *and not from conjecture, &c. It is not necessary *217 that any technical or artificial form of words should be used in a will; but we must collect the intention of the testator from those words which he has used, and cannot add words which he has not used, &c. The testator has not used words signifying his intention to give an estate of inheritance to the daughters, and we cannot supply them." That rule applies to this case. We may conjecture from other parts of this will, and from its provisions applicable to other objects, that there was a mistake, but cannot carry it further than as a conjecture; the words themselves are plain, and at the utmost we can only guess that the testator omitted a particular expression by mistake; conjecture will not warrant a Court in supplying the word.

It is singular that another view of the case has not suggested itself to the Master of the Rolls and the Judges of the Court of Common Pleas. If they were to alter the intent and matter of the will, the most flexible for that purpose would be the words which have created all the difficulty. The testator may have had a good reason for excluding the first son: there is no evidence that he was not otherwise provided for. It would be a hard thing to give him a double provision upon mere guess. Suppose that the trusts for portions and the power had been taken from a precedent, adapted to a case where the first son was not excluded, and unguardedly used in a will where the first son was excluded; is not that case possible? If that is possible, you at once have the whole accounted for, and on principles more reasonable, at least more probable, than any that have been suggested on the other side. What is there to prevent the Court from construing *the words "no son or no eldest son," in *218 the trusts of the terms and the powers, as if they were, "no son entitled under the limitation hereinbefore contained?" That would be a construction infinitely less violent than that to which the Court has arrived; for that would not be to insert a word in the prior part of the will, but simply to read

consistently with it the language in which the testator has described certain events that are to precede the vesting of the respective portions.

This is the first case in which an attempt has been made to supply words in a will, in order to raise a case of necessary implication in the face of an express devise. There must be some words amounting to words of gift to constitute a case of implication; words from which you can infer either that the testator has actually given, though by imperfect language, or that otherwise the estate would be clearly undisposed of.

[THE LORD CHANCELLOR. — Or, that he proceeds on the belief that it is given.]

And that it is undisposed of, must appear. There is no case of implication that has not those ingredients to imply the gift of an estate. The implication must be necessary, and the estate undisposed of; and unless the implication be raised, if there is an heir-at-law, he will take the estate. There are cases in which the Courts, in order to effect the testator's manifest intention, holding the form of the gift to be forbidden by law, give effect to it *cy près*; not executing the very words of the will, which would be void by law if it were so to stand, but doing something as near the intention as they can; and that is often called necessary implication. This is a case in which that is attempted to be done, not because the estate is not disposed of, but in the face of an

* 219 express * estate devised to a party who can take. The doctrine of necessary implication which is laid down in *Gardner v. Sheldon*, (a) *Faulkner v. Faulkner*, (b) *Bamfield v. Popham*, (c) *Newburgh v. Newburgh*, (d) and *Dashwood v. Peyton*, (e) cannot be brought to apply to this case. Necessary implication means, not natural necessity, but so strong a probability of intention that an intention, contrary to that imputed to the testator, cannot be supposed. *Wilkinson v. Adam*. (g) In all the cases under the head of implication

(a) Vaugh. 259.

(b) 1 Vern. 21.

(c) 1 P. Wms. 54.

(d) 5 Madd. 364.

(e) 18 Ves. 27, 40.

(g) 1 Ves. & Bea. 422, 466.

there was a suspension of the estate given, and the question was between the heir-at-law and the party during whose life it was suspended. Here the estate is expressly devised, and portions are afterwards directed to be raised in the event and upon the condition that the testator's son should leave no son, nor the testator a future son. The raising of portions is a mere possibility, is postponed to the happening of a remote and uncertain event, and is a different operation from a dealing with the estate. No estate by implication can arise from subsequent limitations in a will, so as to alter or take away an estate expressly limited in the preceding part of it. *Bamfield v. Popham*, (a) *Allanson v. Clitherow*. (b) The rule of construction in all the cases is, first of all, to see what is the ordinary legal sense of the words used. Did any conveyancer ever use the words in the sense here contended for? Is it the standard and established meaning and use of words, that "first son" should be included in the rotation "second, third, fourth, and fifth?" If not, is he to be considered as included in the words "all and every other?" Is it the common sense or the * legal meaning?

* 220

[THE LORD CHANCELLOR. — I suppose this is an amicable suit?]

It is, as far as we are concerned. There is no first son born: the only reason for deciding the question now is, that the trustees must act.

[THE LORD CHANCELLOR. — Why did not they wait until a son should be born? This is purely an imaginary case.]

There is a daughter of J. H. Langston, and she is the appellant. Every party who takes an interest in the will might open the question: the only ground upon which a decision could be come to in such a case is, that this party has a right to call for a settlement, and the trustees have a right to the direction and protection of the Court of Chancery.

(a) 1 P. Wms. 54.

(b) 1 Ves. Sen. 24.

The Solicitor-General (Sir C. C. PEPYS) and *Mr. Jacob*, for the respondents. — When this case first came for further directions before the Master of the Rolls, his Honor stated his opinion to be so clear against the conclusion to which the three Judges of the Court of King's Bench had come, that he should have taken on himself, if he had not thought great deference due to them, to decide contrary to their certificate. One circumstance which may explain how it happened that they came to an opinion contrary to that expressed by the Judges of the Court of Common Pleas and, the Master of the Rolls, is, that the case for their opinions was defectively stated, omitting all those parts of the will on which the main argument arises, and which are most important to be attended to for the purpose of seeing what the testator's intention was. Your Lordships, attending to the trusts of the terms, will find that not one of those terms can have effect if the construction contended for by the other side take place. And

* 221 this, which is said to be an extremely *well-drawn will, and it is so if the eldest son takes, is the most absurd production that ever issued from a conveyancer's office, if he is not to take. There are eight terms created to raise money, according to different situations in which the family may be placed, and not one of them is to be brought into operation in the event of there being a first son of J. H. Langston; and that first son, it is contended, is himself to take nothing. Taking the words as they stand in the clause where the estate is given, your Lordships, it is true, will not find the word "first" there, but looking to all the words of gift you will see that they are sufficient to carry an estate to the first son. When we find words sufficient, and from other parts of the will collect a manifest intention of the testator that his estate should go according to the ordinary way in which limitations are introduced into wills and settlements, we have the only two things necessary; viz., the intention manifest, and the words sufficient to carry it into effect. We require no words to be introduced, but the original and obvious meaning to be given to the words we find. But, on the other side, your Lordships are asked to depart from the words of the will and to introduce the word "younger." The direc-

tions of the will are, that the trustees shall convey, first of all, an estate for life to Mr. J. H. Langston, the son of the testator, and then to the uses of the second, third, fourth, fifth, and all and every other son and sons of the body of him, &c. Under these words how can any one son be excluded? There is a gift to "all and every;" the eldest son surely comes under that description, and is entitled to the benefit of the gift, because he answers that description of the class to which the estates are limited. The appellants say your Lordships cannot go out of * the will, * 222 yet they have gone out of it and supposed a prior settlement to provide for the first son. We, following their example, may suppose that in the copying of the will the word "first" was left out. If we are to go on speculating on what may have given rise to the omission, we find on the face of the instrument enough to prove that there has been a mistake.

[The original draft of the will was handed up to the Lord Chancellor, his Lordship having asked for it.¹ It was stated at the bar that it had been settled by the late Mr. Shadwell, the Vice-Chancellor's father.]

There is an erasure, and "first" stands the only word not erased in the line, so that the copier passed over the whole line so erased, leaving out the word "first," and going to the second, third, &c. We cannot have any benefit from this mistake, nor was it necessary to explain it, for it is quite manifest; and we admit that a manifest mistake will not enable your Lordships to introduce a limitation into a will. That is not required here; for if the word "first" is not in the will, there are the words "all and every other," under which, to make this a consistent will, the first son may be included. Suppose there was no enumeration of one, two, three, &c., which are perfectly useless, — a mere luxury of words in which conveyancers sometimes indulge, — and that, instead of that enumeration, the testator had said, "all and every the son and sons of my son." The limitation would

¹ See 1 Jarman Wills (3d Eng. ed.), 382, note (h); *Yates v. Thomson*, 3 Cl. & Fin. 569, 588.

have been just as good, and the legal effect just the same ; there would have been an estate given and a sufficient description of the class, and every individual of the class would have been entitled. Unnecessary and useless words cannot vitiate a written instrument.

[THE LORD CHANCELLOR. — Suppose the words had * 223 been, to the “first, second, third, fifth, *sixth and other sons,” it would be much easier to say the fourth should be brought in, and no doubt he would.]

There your Lordship supposes the general description to include the fourth, though you cannot find him in the particular enumeration. In the case your Lordship has put, nobody could contend that the fourth would be excluded. Is the rule to be applied as against the eldest, and not against the fourth ?

[LORD CHANCELLOR. — The testator might have had in contemplation a shifting use, or some other estate which would come to the eldest son.]

In every will of that description, where the eldest son is intended to be excluded on account of some other provision for him, some words are found to indicate that intention. Here there is a total silence of such intention, or of a shifting use. In this well-drawn will the form and phraseology are entirely different from that which a conveyancer would adopt, if he desired to carry into effect an intention of excluding the eldest son ; he would find in his precedent book a clear and well-known form adapted to that purpose, and the mode of expression would be, “to the use of the second, third, fourth, &c., and all and every other son and sons, other than and except an eldest or only son.” That is the form which conveyancers and testators usually employ when intending to effect the exclusion of an eldest son ; and it is a form of limitation which necessarily does effect that object, because it plainly expresses that meaning ; but when, after an enumeration of some sons, we say “every other son,” it does not

mean an exclusion of the eldest son unless some other words be found to exclude him. There are several other parts of this will in which the testator, making limitations in favour of younger children, has used the proper form of exclusion ; * as “such daughters or sons, other than and * 224 except an eldest daughter,” or “other than and except an eldest or only son.” To provide for the younger daughters of the testator’s eldest daughter, he creates the term of 600 years, which is “for the portion and portions of all and every such daughter and daughters of my said daughter Maria Sarah Langston, other than or besides an eldest or only daughter.” The same form of expression again occurs as to the portions for his daughter Elizabeth Catherine Langston’s daughters, “other than and except an eldest or only daughter :” and again, in a manner still more pointed, in the power given to Mr. J. H. Langston to charge portions for his younger children.

We are not asking your Lordships to do violence to any words that are in the will ; we are not asking you to supply any ; we are asking for a construction of the words which we find. We ask you not to exclude the first son, contrary to the general description of the persons who are to take estates, but to include him if he answers the description of the class, though not before expressly enumerated in it. The clause consists of two parts : first, the description of the persons to take under it, namely, the “second, third, fourth, and fifth, and all and every other the son and sons of the body of him my said son lawfully to be begotten.” These words express the persons whom the testator intended to take ; and then follows the second part of the clause, which describes the manner and form and order in which these persons are to take, “severally, successively, and in remainder one after another, as they and every of them shall be in seniority of age and priority of birth.” The particular form and order of the enumeration, the third after the second, and the fourth after the third, is a matter wholly immaterial.

* It can have no effect whatever in the construction of * 225 the will, whether the testator mentions the second before the third, or the third before the second. If the will had stopped with the first part of the clause, and there had

not been the addition of those words which point out the form and manner and order of taking, "severally, successively, and in remainder, as they and every of them shall be in seniority of age and priority of birth," the effect of that limitation alone would have been that the second, third, fourth, fifth, &c., would have taken the estate as joint tenants, or as tenants in common, there being no words of severance; and if there had been no words of inheritance, they would have taken as joint tenants for life. They were not, therefore, intended to take together, but one after another, and then the question arises in what order they are to take? They are to take "successively as they and every of them shall be in seniority of age and priority of birth." These words apply to and govern the mode of taking with respect to the second, third, fourth, and fifth sons who are specifically named, as well as with respect to "all and every other the son and sons." The second son undoubtedly takes before the third; but he does not take before the third because he is mentioned before the third, but because the testator has said they shall take successively as they are in seniority of age. The words "second, third, fourth, and fifth" are little more than surplusage, meaning exactly the same as if the testator had said merely "all and every son and sons." Some conveyancers in a limitation would enumerate "first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth, and all and every other son and sons;" others, less prodigal of words, would say only "first, second, * third, fourth, fifth, and all and every other;" while other conveyancers, still more moderate, would limit the enumeration to the use of the first, second, and all and every other the son and sons, or would content themselves with saying "to the use of all and every the son and sons successively;" and the meaning in all the cases would be the same. If the testator here, instead of enumerating the second, third, fourth, and fifth, &c., had inverted that order, and put it to the use of the fifth, fourth, third, second, and all and every the other son and sons, or if he had varied the order in any other mode, still the result and meaning of the words would have been precisely the same, in connection with the other part of the

clause. But it is said that the natural construction of the word "other" is subsequent; there is no authority to show that by the word "other" is meant subsequent or younger. If any one were to enumerate the Judges of the land, although it might seem somewhat whimsical to begin by mentioning first some of the junior Judges; but if any one speaking of them were to mention Mr. Justice BAYLEY, Mr. Justice HOLROYD, and Mr. Justice LITLEDALE (who signed this certificate), and "all other the Judges of the Courts of Common Law," would there be a doubt that the Chief Justices and all other Judges of those Courts would be included?

We take the benefit of all those arguments that have been used against construing the will by implication, or giving to words a signification different from that which they literally mean. The appellants resort to implication, and they desire the word "younger" to be introduced into the will. We are not driven to contend that the word "first" is to be supplied, unless they succeed in persuading your * Lord- * 227 ships that the word "younger" is to be implied; nor is it necessary for us to go to any point of mistake, we suppose that there is none. If it were necessary to interpolate "first," there is enough on the face of this will to authorize it. Our argument is one of the simplest character; we have only to bring in aid the arguments of the appellants against unnecessary implication. We say that here there is no necessity for altering the language of the will; we are to take these words as they stand, without interpolating others; without giving to those words any other sense than that which they bear in the English language, holding that "all" comprises "all," and that "other" means "other," and does not mean "younger" or "subsequent." As to the hypothesis that the testator had intended, for a particular reason arising from settlements of other property, to exclude his eldest son, there is nothing whatever affirmatively on the face of this will to countenance any such supposition. Cases of that kind continually arise, in which an eldest son is excluded by reason of being otherwise provided for; but in almost every case of that description, in the beginning of the will or settlement there is some reference made to that other provision; as a

recital, that "whereas my eldest son is provided for by, &c., therefore I devise," &c.; but nothing of that sort is found here. In wills and settlements of that description is also found another clause, which is to the effect, that in case the second son shall come to be owner of that property in respect of which the exclusion takes place, that second son shall take no longer under the will, but there shall be a shifting use, by which it shall go over to the third. In this

* 228 case there is an absence of that provision, * and there is nothing from which it can be inferred.

Your Lordships may have observed, that after the limitations that follow one another in this will to the different members of the testator's own issue, the ultimate limitation, after the failure of all the issue, is to the use of the testator's sister, Sarah, the wife of Peter Cazalet, Esquire, her heirs and assigns for ever. The testator did not intend in that case that Mrs. Cazalet should be the only sister benefited by the property, because in the latter part of his will, having given a term of 1500 years to take place in that event, the trusts of that term are, "that in case there should be no son or daughter of the body or respective bodies of his said son, J. H. Langston, or of his said then present daughters or any of them, nor any future son or daughter of the testator's body, or there being any such son or sons, daughter or daughters, if all and every such son and sons should depart this life without issue male, and all and every such daughter and daughters should depart this life without issue before any of them should attain the age of twenty-one years, then they, the trustees, should within the space of twelve calendar months after the several deceases of the testator's said son, J. H. Langston, and his said present daughters, and failure of all such issue, levy and raise the sum of 80,000*l.*, and should pay one moiety thereof to the testator's sister Mary Ann, the wife of George Arnold Arnold, her executors, administrators, and assigns, and the other moiety thereof to his nephew Haughton Farmer Okeover, his executors, administrators, and assigns." If, according to the arguments of the appellants, the testator's son had left an eldest or first son, and if that first son left other chil-

* 229 dren * in existence, but all the testator's other sons

and daughters and all their issue had died, so that there would be a failure of the limitations of the will, and Mrs. Cazalet would become entitled to the estate; in that event Mrs. Arnold and Mr. Okeover would not be entitled to the 40,000*l.* each, directed to be raised by that term. The existence of a first son of J. H. Langston would prevent the raising of that sum for those relations; though he is to take nothing, he is to prevent others from taking. The trusts of most of the other terms are equally embarrassing and equally inoperative, if this first son is not to take an estate under the first limitation in remainder. But there is also a power for raising 25,000*l.* for the younger children. What would be the consequence of this provision? It would be, that if there was one son and one daughter of J. H. Langston, the daughter, according to the argument of the appellants, would take the whole estate, and the father would have power to raise 25,000*l.* for her out of her own estate. Is not that perfectly inconsistent with the eldest son being excluded? Is it not obvious that the eldest son is the party to take, inasmuch as the father is to have a power, out of the estate of the son, of raising 25,000*l.* for the younger children. If the son take an estate, nothing is more rational or more according to the ordinary mode of practice than to raise a sum out of the estate for the daughters.

It is hardly necessary to resort to aid here to any of those cases tending to show that, where there is a mistake, either apparent on the face of the will, or to be collected from the will in connection with other circumstances which the Courts think themselves justified in looking at, that mistake may be corrected. But there are cases of that kind going much farther * than is asked for by the respondents, * 230 such as *Doe v. Geary*, (a) and *Garvey v. Hibbert*. (b)

In the latter case a testator gave to the three children of D. D. 600*l.* each; but there being four children at the date of the will, the fourth was declared entitled to the like legacy, on the ground of the omission being an evident slip of the testator.

In the argument of the present case before the Court of

(a) 1 Ves. Sen. 255.

(b) 19 Ves. 125.

Common Pleas, Mr. Justice BURROUGH cited from a manuscript note the case of *Clements v. Paske*, (c) * much

(c) The reporters have been furnished by Mr. Bowker, the solicitor for the appellants, with a copy of the short-hand writer's note of this case, as stated by Mr. Justice BURROUGH :—

" CLEMENTS v. PASKE. — J. C., great-uncle of the plaintiff, was seised in fee of premises, part copyhold and part freehold, and on the 28th February, 1766, having previously surrendered his copyhold to uses of his will, he made a will, now revoked, but still uncancelled, by which he devised all his real or leasehold estates, not otherwise disposed of, to trustees for the life of J. C., his nephew, to support contingent remainders, and to permit J. C. to receive the rents, &c., for life, remainder to the first and eldest son of his body lawfully issuing, or that is lawfully issued, and to the heirs male of the body of the first son lawfully issuing or issued, and for default of such issue, then likewise to the second, third, and every other son of the said J. C., successively and in remainder, &c., and the several and respective heirs male of the body of every such second, third, or other son; and in case of such issue failing by J. C., remainder over to the first and eldest son of his (testator's) nephew, M. C. (as before); and in case of such issue failing by Matthew C., remainder to all and every daughter and daughters of J. C. and their heirs, as tenants in common, &c.; and in default of such issue, remainder to Elizabeth W. and Mary K. before mentioned, &c., subject to two legacies; proviso containing a power for persons in possession to lease for twenty-one years at the best rent." This is not the will in question, and the Court had no right to look at it. The will in question was stated in a case from the Court of Chancery, for the opinion of the Court of King's Bench, to this effect: "The testator, by his last will, first of all revoking the former, and mentioning his intention of disposing of his worldly estates, and devising some real estates to the said J. C. in fee, and giving several legacies, devised all other his real and leasehold estates to, &c., in the same words as in the former will, except that after the devise to the eldest son of J. C., the words 'and to the heirs male of the body of such first son lawfully issuing or issued,' were wholly omitted. The testator died in May, 1767, leaving the said J. C., the father of the plaintiff, his heir-at-law, who entered under the will and possessed during his life, and died intestate in March, 1779, leaving the plaintiff, aged twenty-three, his only son by his first wife, and heir-at-law, and leaving also one son and five daughters by a second wife, all now living. The plaintiff was the only son of J. C. at the making of both those wills; he entered on his father's death, and suffered a recovery to his own use in fee, and was admitted to the copyhold, to the use of himself, his heirs and assigns. The question is, what estate the plaintiff took under the devise in the said last will?" The Court said they would certify: and in the next term Lord MANSFIELD gave his opinion in these words: "The Court took time

more fully than it is given in the report of *Doe v. Hallett*. There was a prior will, which, however, *could * 232 not be looked at for the purpose of construing the

to consider this case, and to avoid one of two extremes in the construction of wills; first, that there may not be an arbitrary latitude in determining what the testator meant when he omits the expressions necessary to explain his will; secondly, that there may not be such a strictness when the testator slips in technical or positive expressions; for if his meaning is to be collected from the will itself, then the will ought to prevail. No one can doubt here that it was a slip of the pen; he means to make a limitation in strict settlement, remainder to the first and eldest son of the body of the said J. C. lawfully issuing, or that is lawfully issued; and for default of such issue, then likewise to the second and third sons, &c., and the several and respective heirs male," &c. He added, "Both from the general tenor and the particular expressions, no man alive can doubt but that he meant a strict settlement to James Clements and every other son. Suppose he had devised to the second son, as he now has, and had then said, 'I mean the same estate for my eldest son;' this would certainly have been sufficient. So it will in the present case; for he gives it to the first and eldest son, J. C., and for default of such issue, then *likewise*, &c.; he meant to give the first son the same estate he has given to the second son. We have so certified."

Mr. Preston has done the reporters the favour of noticing in the above statement an omission of an important part of the will; viz., "The eldest of such sons and the heirs male of his body," &c., as distinguished by italics in the following MS. note of the case in his own possession, which he has kindly communicated:—

"The testator devised to one for life, and after his decease, to the first and eldest son of the body of his said nephew, James Clements, lawfully issuing or issued; and for default of such issue, then *likewise* to the second, third, and every other son of his said nephew James Clements, successively and in remainder one after the other, as they shall be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of every such second, third, and every other son or sons, *the eldest of such sons and the heirs male of his body being always preferred and to take before any of the younger sons and the heirs male of his body*; and in case of such issue male failing by my said nephew, James Clements, as aforesaid, then I give and devise," &c.

"It was decided that James Clements, the nephew's son, took an estate tail by implication.

"The question put to the Court was, what estate did James Clements, the nephew's son, take under the devise in the testator's will?" — Trower's MSS.

"Mr. MADDOCKS and Mr. FEARNE were of opinion the eldest son of the nephew took an estate tail."

existing will. In the first will the testator gave his real and leasehold estates, not otherwise disposed of, to trustees for J. C. (his nephew), for life, to permit him to receive the rents, &c., for his life; remainder to the first and eldest son of his (the nephew's) body lawfully issuing, and to the heirs male of the body of that first son lawfully issuing or issued, with remainder to J. C.'s second son, and the first and eldest son of his body, &c. In the second will, on which the judgment of the Court was pronounced, the words giving the estate of inheritance, "and to the heirs male of the body of such first son lawfully issuing or issued," were omitted. Lord MANSFIELD, in giving his opinion said, no one could doubt that it was a slip of the pen; the testator meant to make a limitation in strict settlement, and to give the first son the same estate he gave the second son. That was a case much more difficult to deal with than the one now before your Lordships; there was an omission of all limitation, and nobody could doubt that, taking the whole together, it was an accidental omission, although there were not other parts

of the will showing a manifest intention of the testator,
 * 233 as in this case; * there were not those eight terms, all and each assuming that the eldest son was to take; there was nothing to explain the omission; the words of gift were wanting, but the gift was inferred; but here we have the words, the issue of the eldest son, frequently occurring; and if there be no words in the first limitation importing a gift to the first son in direct terms, there are words implying that he was intended to take an estate; all the subsequent provisions of the will go on the assumption that the first son was to have the enjoyment of the estate; from every part of the will we collect words of gift and the intention manifest.

Mr. Knight, in reply.—The question for decision resolves itself into two heads of consideration: first, what would be the effect of the limitation to the second and other sons, if it stood alone? and, in the next place, what is the effect of the other parts of the will on that limitation? Your Lordships have looked during the argument at the draft of the will, which I am satisfied will not make the slightest impression on

your Lordships, as it formed no part of the evidence in the cause, either at law or in equity. The first part of the argument for the respondents is, that "all and every other" include the first son, because the words are general. In the second part of the will your Lordships will see that the testator perfectly well knew how to use the word "first," for after the 500 years' term, he says, "to the use of the first, second, third, fourth, and fifth, and all and every other," &c. The testator did not there trust to the general nature of the word "other." These are the limitations to the sons and daughters of J. H. Langston. Then the testator takes up the children of Maria Sarah Langston, * to the use of * 234 the first, second, third, fourth and fifth, and all and every other; and he uses the word "first" in the subsequent limitations to the children of his other daughters.

The case of *Doe v. Hallett* was decided upon the ground that the law had affixed to a particular phrase a sense that was not to be altered. There is another rule of construction, with regard to which the Courts have uniformly acted; that is, not so to construe the general expression occurring at the end of an enumeration, as to include that which, according to the natural order, ought to be in the beginning. That is a general rule applicable to Acts of Parliaments and all other instruments. What is the common case of a bequest of household furniture, goods and all other effects in and about a house? The word "effects" is restrained from its naturally general meaning to things *ejusdem generis*; because the testator commencing his enumeration with a particular class of things, is not to be held to have meant to extend it. (a) What shall we say to the received construction of the Act 13 Eliz. c. 10, as to "deans, parsons, vicars, and all other persons having ecclesiastical promotion?" Is it not law as old as the time of Lord COKE, and universally recognized, that you cannot include in the general words last mentioned, persons of higher degree than those before mentioned? (b) There is a

(a) See *Jones v. Lord Sefton*, 4 Ves. 166; *Stuart v. Marquis of Bute*, 1 Dow. 73; *Michell v. Michell*, 5 Madd. 69.

(b) Archb. of Cantb. Case, 2 Co. Rep. 46 (Thomas & Fraz. edit. vol. 1, 557).

case of recent occurrence, where a particular Act of Parliament connected with the customs contained a provision respecting the importation of iron, copper, and all other * 235 metals, &c. Gold and silver had been * imported in bars, and it was argued that gold and silver were included under the general expression "all other metals." "No," said the Judges, acting on that universal rule of construction which has prevailed in the English law, "that is not a sound rule of construction; we cannot hold that general expression to include something higher and greater, and which in its natural order would have gone before." If the language of the first limitation stood alone, no Court could have held that the "first" was included under the general and inferior term "other;" then the only question is whether your Lordships are driven by necessary implication from what follows, to say that a different rule of construction ought to be applied. The principal cases under the head of implication have been already cited, and no one has been found to sustain this decree.

THE LORD CHANCELLOR. — My Lords, in consequence of the peculiar nature of this case I shall refrain from calling on your Lordships for immediate judgment on the important question that has arisen in construing this will; important in almost every view of the case, but more particularly as there has arisen a marked difference of opinion between the two eminent tribunals to which the Court of Chancery successively sent cases for opinions. The Court of King's Bench certificate had not the authority of the whole Court, certainly; but it was not because the learned Chief Justice did not concur with the other three Judges; he did not hear the case argued, in consequence of an arrangement forced upon the Court by extreme pressure of business, by which the most important matters were decided in a chamber near the Court * 236 by three puisne Judges, and the * least important matters during term were decided by the whole Court: that is the reason that the name of Lord TENTERDEN is not to the certificate; we have no knowledge whatever what his opinion might be on the case. The Master of the Rolls ap-

peared to have been dissatisfied with that certificate, and therefore sent a case — more fully, it is said, but we should look into that among other things — to the Court of Common Pleas, and that Court came to the resolution contained in their certificate unanimously, without reasons assigned; that certificate is signed by the four learned Judges of that Court; and the Master of the Rolls on a further hearing decided that the eldest supposed son of James Haughton Langston took an estate in tail male, expectant on the life-estate of his father. The case comes before your Lordships by appeal from the Master of the Rolls. I should wish to have an opportunity of looking into this with the assistance of some of your Lordships. I do not say now which way my opinion leans. I feel great force in the argument in support of the decision of the Court below, with the force of which it is not easy to grapple; at the same time, I feel the utmost deference and the greatest respect due to the three most eminent lawyers in the Court of King's Bench who came to a directly opposite conclusion; and undoubtedly I feel the full weight of those arguments urged here on the appellant's side, by which in all probability those three Judges were moved to give the opinion that has been certified to the Master of the Rolls, which goes to this, that you are not to make a will; you have no right to fancy or to imply, unless there be something within the four corners of the will which is not only consistent with the implication you make, but which could hardly stand, if at all, in the * will without that implication being made. *237 That is what is called necessary implication, and legitimate implication, in contradistinction to gratuitous, groundless, fanciful implication.

My Lords, concurring entirely in that principle, and only doubting whether the learned Judges had not allowed it to shut their eyes to what was within the four corners of the will, expressing no more at present than my doubt whether that principle had not carried them so far as to make them rather disregarding of the rest of the instrument which seemed to supply that matter of necessary implication according to fair construction, I should, out of great respect and deference to the learned Judges who so held in the Court of King's

Bench, suggest the propriety, before coming to a decision either way, of having the matter a little further considered. If, upon consideration, I should not feel that entire confidence which would justify me in advising you to affirm the decision below in the face of the certificate of that most justly venerated part of the King's Bench, I should be very much disposed to suggest to your Lordships the expediency of having this case argued by one counsel of a side again, before such of the learned Judges who have not hitherto heard it, — great changes have unhappily taken place, Mr. Justice HOLROYD is no more, and Mr. Baron BAYLEY is no longer on the Bench, — but before such of the learned Judges as were not then in that Court, and the Judges of the Court of Exchequer, who formed no party in those stages of the case. It is only, however in the event of my not having a very clear opinion, or of feeling so much distrust in that opinion, that I cannot put it forward, though supported by the Court of Common

* 238 Pleas, against the * great authority of the learned Judges of the Court of King's Bench — it is only in that event I should feel disposed to put the parties to the expense and your Lordships to the delay of further argument.

June 9.

THE LORD CHANCELLOR. — In this case, my Lords, a question arose upon the construction — or rather, if any way were open to us of supplying a defect in the construction — of the will of the late Mr. Langston. And the question assumes an importance beyond even what naturally belongs to it, when we consider that, two cases having been sent for opinion from the Court of Chancery to two different Courts, the higher Courts of Westminster Hall, those two Courts certified opinions directly in opposition to each other, but without stating their reasons; giving us occasion again to regret that practice, which has of late years sprung up, but which I hope and trust is now about to be terminated by reverting to the ancient practice. Those certificates came to the Court which sent the cases, unaccompanied by the reasons upon which they were founded. All that we know, therefore, is that the questions were argued by learned counsel in those Courts;

that time was taken in each case for the consideration of the Court; and that the question being whether Henry Langston took any and what estate under the will, in the one case the Court of Common Pleas certified their opinion that Henry Langston took under the will an estate tail in tail male; whereas the Court of King's Bench certified that Henry Langston took under the will no estate whatever.

My Lords, the will contains a series of limitations; it is penned with great care; it is the production of a professional man; it is a production of great professional *skill and experience; it is one of the most artificial, * 239 one of the most elaborately penned, one of the most carefully conceived instruments, which it has ever been my lot to be called upon to examine; nevertheless it does so happen, as if to confound the pride of human learning and experience in legal matters, that this production of the most practised conveyancer has as much occasion for the helping interposition of a Court of Equity or of Law before which it comes to give it effect, as if it had been penned either by an ignorant peasant, without any professional aid, or by one of those rustic artists whose partial knowledge of conveyancing (I mean those who sometimes make wills in the country for persons a little more ignorant, and but a little more ignorant, than themselves), and whose handiwork often gives rise to much labour and to inextricable difficulties in Courts of justice.

My Lords, no person out of Court can read this instrument without being perfectly persuaded that an accident must have happened either in the framing of it originally, or in copying the draft, whereby a line or two has been left out: either the limitation, which was intended to be inserted, and which was taken for granted to have been inserted in the draft, was by some accident omitted; or that being in the draft, a couple of lines were passed over in copying the draft into the engrossment. For instance, to show that this must be the case, the very first person that was likely to take any estate under the will after the only son of the testator *in esse* at the date of his will, the eldest son, is disposed of by being omitted. He is not named there at all. "Then are you," say the Court of King's Bench, "to give him an estate tail, or any es-

* 240 tate at all, when he is *not even named in the will?

Named he is for other purposes and in other respects, but not to take any thing ; not to benefit under the will."

I here lay entirely out of view an incident which occurred during the argument. I had a curiosity to see the draft from which the engrossment was made, and one party were exceedingly anxious that my curiosity should be gratified ; but that anxiety was met by just an equal anxiety on the opposite side that it should remain unsatisfied. I at once, therefore, proceeded to have a still greater anxiety and curiosity, because I plainly saw it was likely to be a decisive matter. I was aware, as a lawyer, that I had no right to look at it, but, humanly speaking, it was impossible not to wish to see whether one's extra-judicial conjecture was well founded, namely, that the whole history of this was an error in copying ; and accordingly, when I looked at it, I found that there was a limitation to the first son of testator's son, James H. Langston, which the person who made the engrossment had, for a very obvious reason, passed over in copying it, having in his haste gone from the same word in one line to the same word in another, in mistake. I here lay that entirely out of view. It has no right to enter into the consideration of the case, and I can positively assure your Lordships that I have formed my opinion upon the instrument as it now stands, without matter *dehors*, without having recourse to the draft.¹ I have no right to look at the draft, but anybody who reads

A mistake, clear on the face of a will, is legitimate ground of construction.

this will, — and that is my first reason for agreeing with the Court of Common Pleas rather than the King's Bench, — anybody who reads this will cannot, if he has his senses about him, doubt

* 241 that some mistake must have happened ; and that is *a legitimate ground in construing an instrument, because that is a reason derived not *dehors* the instrument, but one for which you have not to travel from the four corners of the instrument itself.

¹ See the remarks upon this proceeding in 1 Jarman Wills (3d Eng. ed.), 382, note (h). In *Grant v. Grant*, L. R. 5 C. P. 736, Mr. Justice BLACKBURN said, "I have always entertained a notion that the sight of the draft had something to do with the decision."

The next point to which I advert; as the second ground upon which I agree with the Court of Common Pleas, and not with the King's Bench, is that, when the framers of this instrument really meant to exclude a child, or an eldest child, whether a son or a daughter, no persons knew better than they did how to effect that purpose. If your Lordships will look to the will itself, you will find that, in cases where they intended any such exclusion, no person knew better than they how to effect it. In the declarations of the trusts of the term for 800 years, for instance, "for raising the portion or portions of all and every such daughter and daughters of his the said testator's said daughter, Caroline Langston, other than and besides an eldest or only daughter;" so also in another (the fourth), of the eight terms created by this will, are used the proper words of exclusion, "for the portion and portions of all and every such daughter and daughters of my said daughter Elizabeth Catherine Langston, other than and except an eldest." So, again, the testator uses like words where a son is to be excluded; as in the power for James Haughton Langston to charge the estates in case there should be any child or children of his body lawfully begotten, other than and besides an eldest or only son." This, therefore, is a circumstance always of some weight where you find it; it is a topic always worth considering. When you find that, where the meaning

When the testator's intention is manifest in one part of his will, and he adopts a clear mode of effecting it, that circumstance may be safely used to throw light on other parts of the will where the intention is doubtful.

is clear and there is no doubt whatever as to the intention, he adopts an effectual, clear, and precise mode of *executing that intention; you may also safely and *242 logically employ that to throw light on those other instances where it is doubtful, and where the question is whether he means this or that. If you find that he does not in those places use those words which he has used where there was no doubt what his intention was, you have a right to say that he did not mean the same thing, because, when he did clearly and undeniably mean this thing and not that, this was his mode of expressing himself in order to carry that intention into effect.

My Lords, the third of the reasons, — and I go over them

with the less particularity, because I am now affirming the judgment of the Court below, nor should I at all go into the reasons but for the conflict between the Courts of King's Bench and Common Pleas,—the third of the reasons is one which I cannot help feeling to be exceedingly powerful, and which, upon all the views I can take of this subject, presses forcibly upon my mind. The existence of a son is to defeat no less than eight terms raised most carefully, artificially, and anxiously by the persons who penned this instrument; and yet that son whose existence is to produce such an effect, to create such destruction, to deal about such havoc upon the whole of this will, is not, according to the construction set up by the King's Bench and by the appellant, to benefit under it in the slightest degree. My Lords, it is monstrous to suppose that any rational person could really intend to make so much depend upon the event of a person coming into existence, which person, nevertheless, was to be of no force, of no effect, of no value in his eyes, except to be used as

* 243 an instrument of destruction; that he was only * to be considered as the means of taking away the benefit of other parts of this instrument, and yet was himself to benefit nothing by that destruction.

My Lords, in the fourth place, Henry Langston's existence must be allowed, according to the argument of the King's Bench and of the appellants, to defeat nearly the whole of this will. There are two modes of reading an instrument; where the one destroys and the other preserves, it is the rule of law, and of equity, following the law in this respect (for it is a rule of common sense, which I trust is common to both sides of Westminster Hall), that you should rather lean towards that construction which preserves, than towards that which destroys. "Ut res magis valeat quam pereat," is a rule of common law and common sense; and much the same principle ought surely to be adopted where the question is, not between two rival constructions of the same words appearing in the same instrument, but where the question is on so ready an instrument as that you may either take it verbally and literally, as

A construction which tends to preserve all parts of the will is to be preferred to that which destroys it, especially when the more liberal construction accords with the probable intention of the testator. "Ut res magis valeat quam pereat," is the rule.

it is, or with a somewhat larger and more liberal construction, and by so supplying words as to read it in the way in which you have every reason to believe that the maker of it intended it should stand; and thus again, according to the rule "ut res magis valeat quam pereat," to supply, if you can safely and easily do it, that which he *per incuriam* omitted, and that which instead of destroying preserves the instrument; which, instead of putting an end to the instrument and defeating the intention of the maker of it, tends rather to keep alive and continue and give effect to that intention. If this is a rule applicable to all cases, it surely is more peculiarly applicable to a case like the present; for I will only shortly advert to a circumstance * which weighs in my mind materi- * 244 ally in giving a larger effect than I otherwise might feel disposed to give to these considerations, and leads me to supply, more readily than I should otherwise do, the words wanting. It is, that you are here dealing not with a legal limitation, but with an executory trust. It is sufficient simply to state that, and to advert to that consideration, to entitle me to think that I may, therefore, give a larger latitude by a good deal to the construction of an executory trust, than I might have been disposed to give if it had been a strict legal limitation. Nevertheless, my Lords, I confess that, even if this, instead of being an executory trust, had been a legal limitation, the reasons I have already given and those I am about to add, and which weigh more forcibly upon my mind than those I have gone over, would have been quite sufficient to compel me to read the legal limitation as the Court of Common Pleas has read this executory trust.

Executory trusts admit of a larger latitude of construction than legal limitations.

I wish to call your Lordships' attention to that extraordinary effect which of necessity must follow, and which I look upon to be almost a *reductio ad absurdum*, from the construction put upon it by the Court of King's Bench; looking only to that same clause which I have already *alio intuitu* referred to, I mean the beginning of the clause where the power is to be inserted in the settlement for charging portions for J. H. Langston's younger sons or daughters, and where the exclusion of James H. Langston's eldest or only son is effected by

apt and proper words. It thus appears that this monstrous conclusion indisputably follows, that if there were one son and one daughter, then there is to be charged 25,000*l.* upon the

daughter's estate for the behoof of that daughter her-

* 245 self! Absurdity could go no further. If the son is * to

take an estate, that you should provide most carefully for raising 25,000*l.* by a charge for the benefit of the daughter, is perfectly intelligible; but here, according to the construction put by the Court of King's Bench, a sum of 25,000*l.* is to be raised; for whom? Out of what estate? Not out of the son's estate, for he does not take an estate tail, but out of the daughter's estate, for she takes it to the exclusion of the son. And for whose benefit is the 25,000*l.* to be raised? Not for the son, but for the daughter, who takes an estate burdened with a power to raise her own 25,000*l.*! I cannot believe that this was ever argued before the Court of King's Bench; I cannot believe that it was even stated to the learned Judges. It was not argued *in banco*, and that is one comfort for me to know; and another comfort I derive from it is, that I had the good fortune to put an end to these sittings not *in banco*. A Court of three Judges, sitting in a corner of Westminster Hall, with two counsel, one on each side, is not in my mind so satisfactory a way of putting an end to disputed points of law, as where you have my Lord Chief Justice sitting as the head of his own Court, and the three puisne Judges with him, and all the bar arranged around, witnessing the argument. That experiment of a Three Judges' Court, which was of a temporary nature, was discontinued; but it was during its existence that this case was argued. There was no Lord Chief Justice present; there were three Judges, undoubtedly of profound learning, and who, if the case had been fully argued before them, would have had this point presented, which there is no getting over, which is a contradiction in terms, which implies what no rational being could ever have intended. If I have a son and a daughter,

* 246 and I give an estate tail to the son, * there can be nothing more reasonable than my giving 25,000*l.* by way of charge upon that estate while the estate tail of the son lasts, that the daughter may be provided for, inasmuch

as she has no estate, but the son has it. But who ever thought of giving no estate tail to the son, but giving the whole estate to the daughter, and then raising 25,000*l.* out of the daughter's estate, out of her own estate, for her own benefit, by way of a charge on her own estate tail in the same premises? I cannot understand how this could possibly have been overlooked if it had been stated to their Lordships; I think it must at once have disposed of the case.

My Lords, I wish to say a word respecting the force of the term upon which the argument for the appellant mainly rests, the word "other." It is said that, if you can construe an instrument without supplying any thing, omitting out any thing, but upon its own terms, unaltered, unadded to, undiminished, you had better do so, as it is safer to take these terms than to introduce others. I agree with that proposition. Now it does so happen that, if you take these terms as they are here, and neither alter, nor add to, nor diminish them, the words themselves that exist upon the face of the will are sufficient to carry an estate tail in the first instance to Henry Langston, and to support all the terms and other limitations. But it is said by the Court of King's Bench and by the appellant, that "other" always means "younger," "posterior;" and no doubt I leaned at first towards that view of the subject. It is a very plausible argument, and it is true in point of fact. If anybody were to say first, second, third, fourth, and other sons, it must mean the sons after the fourth; but why does "other" mean the sons after the fourth? It is because * you have before enumerated all that come * 247 before the fourth, for you have said first, second, third, and fourth. But suppose I had just happened to have omitted the first, and instead of saying first, second, third, fourth, and other sons, — suppose I had said, to my second, third, fourth, and other sons, leaving out the first, then it is perfectly clear that "other" no longer is of necessity confined to the fifth, sixth, and seventh, but "other" there *ex vi termini* includes the first, because the first is literally the one who answers the description of something other than the second, third, and fourth. The word "other" would then

In the enumeration "second, third, fourth, and other sons," the word "other" describes the first or eldest son as correctly as the fifth, sixth, and seventh.

just as grammatically, as accurately, as strictly, and as correctly describe the eldest son, as it would describe the fifth, sixth, or seventh son, because the eldest son is a son other than the second, other than the third, other than the fourth. The only reason why "other" in all ordinary cases and in the common strain of conveyancing means a younger son is, that in all those cases they never think of leaving out the eldest.

My Lords, these are the grounds which I have now gone over, upon which I have formed my judgment, though with great deference certainly. I have taken a long time to consider it, I have frequently spelled over the instrument and looked into the argument, of which I took a note at the time. These are the grounds upon which it would be affectation to say I have any hesitation in agreeing with the Court of Common Pleas, and differing entirely from the Court of King's Bench. My opinion is that we are to read these words as if there had not been the omission of those other words in the limitation; and, that, even if we are to read them as they stand, the words are

sufficient, literally and strictly construed, to carry an
 * 248 * estate tail in the first instance to the eldest son, and

to limit all the other terms. I go upon the whole instrument taken together. I go upon the whole of the eight terms, and the destruction dealt out in those terms by limiting it in any other way. I go also upon the monstrous absurdity of supposing, according to the case put, that where the will has provided expressly for one son and one daughter, that the son is to take nothing and the daughter all, and yet, though she is to take the estate, she is carefully provided with a sum of 25,000*l.* raised by a charge created upon the estate which she was to have altogether herself: nothing can be more absurd. What can be more common than to argue that words, which otherwise would give only an estate for life, give an estate in fee, if they are coupled with other words which intimate that there is to be a charge upon that estate which an estate in fee only could support? Any thing that extends beyond a life-estate converts that life-estate into a fee, because it is clear that the person would not have given a life-estate if he had meant that any burden should be saddled upon that

life-estate which nothing but a fee could support. So, in like manner, when an interest is given to A., which it can only be understood that A. would have any occasion for in the event of B. having the estate tail, can there be a sounder reason than that for so construing the instrument as to give the estate to B. and not to A.? Therefore, that view is of itself decisive of this question, and it would make absolute nonsense of the will to read it in any other way. Upon the whole I must advise your Lordships to agree with his Honor the Master of the Rolls, and to affirm this judgment, which proceeds upon a preference given to Henry Langston, who was for this purpose supposed * to be in existence, * 249 entitling him to take an estate tail under the will. I agree, therefore, in the opinion that he took an estate tail clearly under this will, taken altogether; adding to the other circumstances this consideration, that we are here dealing not with a legal limitation, but with an executory trust. Nevertheless, further adding, that if we were dealing, not with an executory trust, but with a legal limitation, I should say that, for the several reasons I have given to your Lordships, my opinion still would be that, even taking it as a legal limitation and not an executory trust, the eldest son upon coming *in esse* would have taken an estate tail.

It is with equal satisfaction in this as in other cases that I am enabled to state to your Lordships, that my noble and learned friend the Lord Chancellor for Ireland, who heard this case, has sent to me a communication stating that he has come entirely to an opinion in accordance with the decision of the Court of Common Pleas, and that he has no doubt whatever that this judgment I am about to move is right. Whatever direction his Honor made as to the costs below must be attended to. All the costs must be paid out of the fund.

Decree of the Court below affirmed.

* WRIT OF ERROR.

FROM THE COURT OF EXCHEQUER CHAMBER.

MARSH AND OTHERS v. KEATING.

1883.

WILLIAM MARSH, JOSIAS HENRY STRACEY, and GEORGE EDWARD GRAHAM } *Plaintiffs in Error.*
ANN KEATING *Defendant in Error.*

Fraud. Liability of Partners.

F., a partner in a bank, caused stock belonging to a customer to be sold out by a forged power of attorney; the proceeds were paid to the account of the bank, at the house of the bank's agents, and were appropriated by F., who was afterwards executed for other forgeries. The partners of F. were ignorant of the fraud, but might, with common diligence, have known it. *Held*, that the customer could maintain an action against the partners for money had and received.¹

June, 23, 24. 1834, June 25.

THE plaintiffs in error and Henry Fauntleroy, their partner in the trade of bankers, having become bankrupts in 1824, and the defendant in error having proved a debt under the

¹ See Collyer Partn. (5th Am. ed.) §§ 451, 452; M'Farland v. Crary, 8 Cowen, 253; Boardman v. Gore, 15 Mass. 331; Hume v. Bolland, 1 Cr. & M. 130; S. C., 2 Tyrw. 575; Bank of Ireland v. Evans's Charities, 5 H. L. Cas. 389; Vaughan v. Matthews, 13 Q. B. 187, 189; Coles v. Bank of England, 10 Ad. & El. 437; 1 Lindley Partn. (Eng. ed. 1860) 240-250. The principle on which the firm is held liable in such cases is stated, 1 Lindley Partn. 243, 244. The cases are numerous in which a plaintiff has been allowed to waive a wrong committed by the defendant, through the medium of which the defendant has received the plaintiff's money, and sue for money had and received. See Chitty Contr. (10th Am. ed.) 21, and note (g'), 678, and note (x); Jones v. Hoar, 5 Pick. 285; Lamb v. Clark, 5 Pick. 193; Miller v. Miller, 7 Pick. 133; Gilmore v. Wilbur, 12 Pick. 120; Merrick J., in Brown v. Holbrook, 4 Gray, 102, 103; Morrison v. Rogers, 2 Scam. 317; Gray v. Griffith, 10 Watts, 431; O'Conley v. Natches, 1 Sm. & M. 31; Berly v. Taylor, 5 Hill, 577; Gardiner Manuf. Co. v. Heald, 5 Greenl. 381; Ripley v. Geltson, 9 John. 201; Willet v. Willet, 3 Watts, 277;

commissions of bankruptcy issued against them, the assignees under the commissions presented two petitions to the Lord Chancellor sitting in bankruptcy; one, stating that the said bankrupts were not indebted to the defendant in error, and praying, among other things, that her proof of debt might be expunged; the second, praying for leave to file a bill in Chancery for the purpose of expunging that and other proofs. The Lord Chancellor, by an order made on both petitions, and bearing date the 12th of May, 1831, ordered that, for the purpose of trying the question, whether the said bankrupts were at and before the issuing forth of the said joint and separate commissions, and still are, justly and truly indebted to the said Ann Keating in any and what sum of money, an action should be forthwith brought in * the Court * 251 of King's Bench, by or in the name of the said Ann Keating, against the said William Marsh, Josias Henry Stracey and George Edward Graham, for money had and received by the bankrupts to and for her use; and that a special verdict should be taken in such action by consent, on a statement of facts to be settled as therein mentioned; and that the defendants in the said action should consent to judgment being entered up in the said Court and in the Court of Error for the said plaintiff, for the purpose of the same being carried by writ of error before the House of Lords. And his Lordship ordered the said petitions and other petitions in the matter of the said bankruptcy to stand over generally; and directed the dividends on the disputed proofs of debt to be vested in exchequer bills, and the interest thereon to be accumulated to abide the event of the said action and the further order of the Court. (a)

Sanders v. Hamilton, 3 Dana, 552; *Stocket v. Watkins*, 2 Gill. & J. 326; *Richardson v. Kimball*, 28 Maine, 463; *Dickenson v. Whitney*, 4 Gilman, 406. But the party whose property has been wrongfully taken or converted, cannot, by waiving the wrong, recover the value of it in an action for goods sold and delivered. *Brown v. Holbrook*, 4 Gray, 102; *Jones v. Hoar*, 5 Pick. 285; *Elliott v. Jackson*, 3 Wis. 649; *Powell v. Rees*, 7 Ad. & El. 426. But see *Alsbrook v. Hathaway*, 3 Sneed (Tenn.) 454; *Janes v. Buzzard*, 1 Hemp. 240.

(a) See note at the end of the case.

An action of assumpsit was accordingly brought by Mrs. Keating, containing merely the common money count for money had and received by the defendants, to and for her use ; and at the trial thereof at the London sittings after Hilary term, 1832, the following special verdict, as previously settled under the said order of the Lord Chancellor, was taken by consent :—

By the special verdict it was found that, on the 10th of October, 1819, there was standing in the books of the governor and company of the Bank of England, in the name of the plaintiff, the sum of 12,000*l.* interest or share in the joint stock called reduced three per cent annuities, transferable at the said Bank of England ; that the accounts of the proprietors of the said stock are kept in certain books

* 252 * of the governors and company of the Bank of England, called ledgers, and that accounts are entered in the form of debtor and creditor accounts in the said ledgers, of the whole amount of the said stock ; in which accounts the sums either subscribed or transferred to individuals are stated as items to their credit, on the one side of the account, and on the other side they are debited with all sums transferred from their names : and that certain other books are kept by the governor and company of the Bank of England, in which are entered transfers of the said stock from time to time, purporting to be signed by the parties transferring the same, or their attorney lawfully authorized. That upon production of the transfer books, the clerks of the governor and company of the Bank of England, who keep the ledgers, enter in the ledgers the sums transferred to the credit of the persons to whom the transfers are made, by adding those sums to their accounts if they already have any, or by opening new accounts with such persons if they have not already any accounts in such ledgers. That no entries in the ledgers are made without the authority of the entries which are made in the transfer books ; but that, upon the production of such entries in the transfer books, the entries are made in the ledgers immediately, without further inquiry as to the genuineness thereof : and that any person on whose account any sum of stock appears in such ledger, is permitted at any time, on ap-

plication at the Bank of England, to transfer the same, or any part thereof, at his discretion. That the accounts are balanced twice a year; for the purpose of making out dividends: that the aggregate amount of the balances forms the aggregate of the said stock called reduced three per cent annuities: that such aggregate amount is transmitted half-yearly to the * audit-office of the exchequer, for the purpose of * 253 ascertaining the amount which will be wanted for dividends; and that the dividends are calculated on the balance so ascertained. That an account is also once a year transmitted to the audit-office of the exchequer, which contains the names of all persons who appear, by the books kept at the bank as aforesaid, to be the proprietors of any part of the said annuities. That the dividends are paid twice a year to the holders of dividend warrants, which are made out from the ledgers, in the names of the persons who appear by the ledgers to be entitled thereto.

That William Marsh (one of the plaintiffs in error) received the dividends which became due in respect of the said sum of 12,000*l.* in the said stock, in the month of October, 1819, under and by virtue of a power of attorney dated the 7th June, 1803, from the within-named plaintiff to the said William Marsh, Sir James Sibbald, baronet, Josias Henry Stracey, and William Fauntleroy, being the persons at the date thereof composing the firm of Marsh, Sibbald, & Co., and paid them to the house of Marsh & Co., bankers, in Berners Street, to the account of the plaintiff, who had a banking account with the said house.

That on the 29th of December, 1819, an entry was made in one of the transfer books of the governor and company of the Bank of England, purporting to be a transfer, under a power of attorney purporting to be granted by the plaintiff to the said William Marsh, Josias Henry Stracey, George Edward Graham, and Henry Fauntleroy, the persons who at the date thereof composed the firm of Marsh & Co., jointly and each of them severally, of 9000*l.* of the plaintiff's interest or share in the said stock, unto * William Brack- * 254 stone Tarbutt, of the Stock Exchange, gentleman, his executors, administrators, or assigns. That the power of

attorney under which the said entry was made was not executed by the plaintiff, but that the signature to the said power of attorney, purporting to be the signature of the plaintiff, was forged by the said H. Fauntleroy; that the said H. Fauntleroy had not any authority from the plaintiff to make any such transfer; and that the plaintiff did not ever authorize or request the said governor and company to make any such transfer of the said sum of 9000*l.* in the said stock, or any part thereof. That in consequence of such entry in the transfer book, an entry was made in one of the ledgers of the governor and company of the Bank of England, by which the plaintiff was debited with the said sum of 9000*l.* reduced three per cent annuities, and credit was given to the said W. B. Tarbutt for the sum of 9000*l.* in the said stock; and that from that time the plaintiff ceased to have credit for the said sum of reduced three per cent annuities in the said ledger.

That on or about the 11th January, 1820, the said Marsh & Co. purchased for the plaintiff the sum of 3000*l.* reduced three per cent annuities, and caused the same to be transferred to the plaintiff, whereby there appeared the sum of 6000*l.* to the credit of the plaintiff in the said ledgers kept at the Bank of England, and no more. That the said W. Marsh attended at the Bank of England in the month of April, 1820, and duly received the dividend which became due on the said sum of 6000*l.* three per cent reduced annuities on the 5th of April, 1820, and signed a receipt for the same, as the attorney of the plaintiff. That since the 29th of

* 255 * December, 1819, very numerous transfers of reduced three per cent annuities, of sums both great and small, had been made to and by the said W. B. Tarbutt, which had been debited and credited to him; and that in the books kept by the said governor and company, the said sum of 9000*l.* reduced three per cent annuities had become blended and mixed with other stocks standing in the said ledgers in the said W. B. Tarbutt's name, and in the said books appeared to have been transferred and assigned by him; that it was not possible to distinguish the account to the credit of which the said 9000*l.* reduced three per cent annuities stood, which were so carried to the credit of the said W. B. Tarbutt, and

debited to the plaintiff as aforesaid; and that no dividend warrant had at any time since the said 29th of December, 1819, been made out for or in respect of the dividends on the said 9000*l.* reduced three per cent annuities in favour of the plaintiff, either together with or apart from any other sum of stock, but that the dividends thereon had been ever since paid to other persons appearing on the said books to be the transferees thereof.

That the plaintiff did not consent to, and had not any knowledge of the above entries or entry having been made in the books of the within-named governor and company.

That upon the 10th of September, 1824, the said H. Fauntleroy was apprehended on a charge of forging letters of attorney for the transfer of certain other annuities in the Bank of England; and that the governor and company of the said bank undertook to prosecute him. That the plaintiff informed the governor and company of the Bank of England of the forgery so committed, as soon as the same came to * her knowledge. That the said governor and com- * 256 pany caused several indictments to be prepared against the said H. Fauntleroy for forging letters of attorney for transfer of parts of the annuities transferable at the Bank of England, and that he was tried and convicted upon one of such indictments on the 30th of October, 1824, and executed on the 30th of November in the same year; but that neither the plaintiff nor the said governor and company preferred any indictment against him in respect of forgery of the power of attorney hereinbefore referred to.

That Marsh & Co. kept an account with Martin, Stone, & Co., bankers in the city of London, in the usual way of a banker's account; and that a pass-book went from one house to the other from time to time, according to the usual practice between bankers. That Marsh & Co. kept a book called a house-book, in which corresponding entries to those in the pass-book ought to have been made; and that, in the due course of business, the pass-book and the house-book of Marsh & Co. ought to have corresponded. That the house-book was in constant use in the banking-house of Marsh & Co., and that the pass-book was frequently brought thither

from the house of Martin & Co. ; but that when it was at the banking-house of Marsh & Co., the said H. Fauntleroy kept the same generally locked up in his own desk. That the said H. Fauntleroy was permitted by the other bankers to conduct the greater part of the business of the said banking-house without their interference, and they reposed great confidence in him ; and that he made very many false entries and omissions in the house-book, and that the same did not correspond with the pass-book in many instances. That the said

* 257 H. Fauntleroy * paid into the hands of Martin & Co., and drew out of their hands, considerable sums for his own individual use, which appear respectively in the pass-book, but not in the house-book ; and also made very many false entries in the other books of the firm, without the knowledge and in fraud of his partners, to a large amount.

That on the 29th of December, 1819, the said H. Fauntleroy ordered one Thomas Butterfield Simpson, a stockbroker, to sell out the sum of 9000*l.* reduced three per cent annuities, described as standing in the books of the said governor and company of the Bank of England, in the name of the plaintiff ; and that the said T. B. Simpson sold the same to the said W. B. Tarbutt, for the sum of 6018*l.* 15*s.*, which sum he received from the said W. B. Tarbutt. That according to the course of business between the said T. B. Simpson and the said Marsh, Stracey, & Co., the said T. B. Simpson allowed the said Marsh, Stracey, & Co. one-half of the usual commission when employed by them to effect sales, and upon the said sale he allowed one half of the commission ; and that the said T. B. Simpson paid the sum of 6013*l.* 2*s.* 6*d.*, being the amount of the sum so received by him from the said W. B. Tarbutt, deducting one-half of the usual commission, by a check payable to the said Marsh & Co., into the hands of Messrs. Martin & Co., to the account of Marsh & Co. ; and the same was entered by them in their pass-book as “ Cash *per* Fauntleroy,” the name of Fauntleroy denoting the name of the individual by or on whose behalf the payment was made. That no entry was made, at any time, of the said sum of 6013*l.* 2*s.* 6*d.*, in the house-book, or any other books of Marsh & Co., but only in the pass-book of that firm

with Martin & Co.; * that it was the business of the * 258 said H. Fauntleroy, as between himself and his co-partners, to have entered the said sum in the house-book, if it had been intended by him for the account of Marsh & Co. That among the books kept by the said Marsh & Co., there was, besides the said house-book, a daily balancing-book, purporting to contain a daily record of the amount of cash left in the drawers in Berners street, and the amount of cash at Martin & Co.'s, as shown by the said house-book, after the conclusion of each day's transactions, accompanied by a proof of the correctness of such balance. That the said H. Fauntleroy in general made up such daily record in the said balancing-book, and the said sum of 601*l.* 2*s.* 6*d.* was not entered in the house-book, nor in the daily balancing-book, on the said 29th of December, 1819, or at any other time, nor did the same ever come into the yearly balances of the said house of Marsh & Co., or in any other manner into their books. That no individual partner of the house of Marsh & Co. could draw moneys out of the said account of Martin, Stone, & Co., but by drafts signed in the partnership name or firm; but that the said H. Fauntleroy paid in, and by means of such drafts drew out, large sums of money for his own individual purposes; and that the account between the said Marsh & Co. and Martin & Co. was repeatedly balanced between the said 29th of December, 1819, and the bankruptcy of Marsh & Co.

That on the 18th of September in the year 1824, in consequence of the discovery of the forgeries of the said H. Fauntleroy, the said W. Marsh, J. H. Stracey and G. E. Graham became bankrupts; and a commission of bankruptcy, bearing date the 16th of the same month, was duly awarded and issued against * them, under which they were duly * 259 found and declared bankrupts; and on the 26th of October following the said H. Fauntleroy also became bankrupt, and a commission of bankruptcy, bearing date the 29th of the same month, was duly awarded and issued against him, under which he was on the same day duly found and declared bankrupt.

That, in the month of April, 1820, credit was given to the

plaintiff, by the house of Marsh & Co., in the banking account kept by the plaintiff with the said house, for the dividend on the sum of 15,000*l.* reduced three per cent annuities, 9000*l.* stock, parcel thereof, being the 9000*l.* reduced annuities before mentioned; the entries respecting the said dividends being made by the said H. Fauntleroy, or under his immediate direction; and that from the month of April, 1820, up to the date of the said bankruptcy, entries were made in the books of Marsh & Co., by which the plaintiff's account was credited with a sum of money as the dividends on the reduced three per cent annuities then in her name, including in such account the dividends on the said 9000*l.* reduced three per cent annuities, as if those dividends had been regularly received from time to time, such entries respecting the said dividends having likewise been made by the said H. Fauntleroy, or under his immediate directions; and that until after the apprehension of the said H. Fauntleroy before mentioned, the said W. Marsh, J. H. Stracey, and G. E. Graham, and each of them, were wholly ignorant of the said forgery hereinbefore mentioned.

That after the bankruptcy, the plaintiff made application to the governor and company of the Bank of England,
 * 260 respecting the said sum of 9000*l.* interest * or share in the said stock called reduced three per cent annuities; and that thereupon the following letter was written to her by the attorneys of the governor and company of the Bank of England:—

“ New Bank Buildings, 4th December, 1824.

“ The governor and directors of the Bank of England have had under their consideration your claim to have 9000*l.* reduced three per cent annuities, which formerly stood in your name, replaced. They find, upon inquiry, that the stock in question was sold and transferred in your name by one of the partners of the late firm of Marsh, Stracey, & Co., and that the produce of the stock was paid into the funds of Messrs. Marsh, Stracey, & Co.; you have, therefore, as the bank is advised, a right to prove the amount received on your account, and to receive a dividend upon that proof under Messrs.

Marsh, Stracey, & Co.'s commission. And we are directed by the governor and directors to request that such proof may be tendered and enforced by petition, if it should not be admitted by the commissioners; after which the bank will be ready to replace the amount of your stock so sold, upon having an assignment of your proof; and the dividends on the stock so replaced, which accrued subsequent to the latest period at which they were credited to you by Messrs. Marsh, Stracey, & Co., will also be paid to you. We beg to add that we are ready to afford you information and assistance as to the evidence by which your right to prove will be established.

"FRESHFIELD & KAYE.

"Mrs. Keating."

That on the 1st of August, 1825, the governor and company of the Bank of England paid the plaintiff the sum of 270*l.*, on her signing and entering into the following receipt and agreement:—

* "August 1, 1825. * 261

"Received of the governor and company of the Bank of England the sum of 270*l.*, being the amount which would have been payable to me by way of dividend on 9000*l.* reduced three per cent annuities, heretofore standing in my name, for the two half years ending the 10th day of October and 5th day of April last, if that stock had not been transferred, as I allege it to have been, without any legal authority from me. I say, received the same, without prejudice to any right I may have to prove for the produce of the said stock under Marsh & Co.'s commission, or my right to claim to have the said stock replaced by the said governor and company. And I do hereby engage (in case the said debt should be decided by a Court of Law to be provable against the said bankrupt's estate), when required by the said governor and company, and at their expense, to tender or cause to be tendered, a proof to the commissioners under the bankruptcy of Marsh & Co., in respect of the produce of such stock so sold out by them; and in case such proof shall be rejected, to permit my name to be used in a petition to be presented by and at the expense of the said governor and company to the

Court of Chancery, for the purpose of enforcing their acceptance of such proof as a debt against the said bankrupts' estate, on being indemnified by the said governor and company from all costs, charges, and expenses which I may sustain or be put to in respect thereof, without prejudice to my right to claim, notwithstanding such proof, to have the said stock replaced in my name by them.

“ANN KEATING.”

That the plaintiff being examined before the commissioners of bankrupt under the commission awarded and issued
* 262 against the said Marsh & Co., * entered into and signed by her agent, thereunto lawfully authorized, the admission following, that is to say : —

“In the matter of Marsh & Co. *ex parte* Ann Keating. The said Ann Keating hereby admits that the paper-writing bearing date 22d of December, 1819, and purporting to be a power of attorney from her to William Marsh, Josias Henry Stracey, Henry Fauntleroy, and George Edward Graham, referred to in the examination of James Fenn before the commissioners, on the 18th of September last, and the 4th of June instant, and exhibited to the commissioners, was not executed by her or by her authority, but is forged and fraudulent. That she discovered such forgery at or about the time of the apprehension of Henry Fauntleroy, in September, 1824, and gave information thereof to the governor and company of the Bank of England, but did not institute any criminal proceedings against any person in respect of such forgery ; and further, that she has demanded from the said governor and company the full amount of stock in respect of which the present claim is made, and all dividends thereon, and that she intends to insist upon such demand, and to enforce the same by law, if necessary, and that 135*l.* is the amount of the half-yearly payment of the said annuity, and that she has received the same sum of 135*l.* half-yearly from the Bank of England, from the time of Marsh & Co.'s bankruptcy, down to the present time, upon signing a receipt and undertaking, whereof the following is a copy (as before set

forth). And the said Ann Keating further admits that this claim is prosecuted by and for the benefit and at the expense of the Bank of England; and that, whether the same shall fail or be established, she insists upon her demand on the Bank of England as above stated."

* In Easter term, 1832, judgment was entered up in * 263 the Court of King's Bench, without argument, for the plaintiff; and a writ of error being thereupon brought into the Exchequer Chamber, the judgment of the King's Bench was also, without argument, affirmed in that Court, the object of the parties being to bring the matter in issue before the ultimate Court of appeal without delay. The defendants below accordingly brought their writ of error in Parliament. The Lords having considered the case proper for the assistance of the Common Law Judges, the following learned Judges attended the House during the arguments: Chief Justice Tindal, Mr. Justice Park, Mr. Baron Bayley, Justices Bosanquet, Gaselee, Littledale, Taunton, Vaughan, J. Parke, and Patteson, and Barons Bolland and Gurney.

Sir Edward Sugden and *Mr. F. Kelly*, for the plaintiffs in error. — The first question here is, whether the plaintiff below has sustained any damage to entitle her to this action. If she lost no money by the transaction, she has not a right to the action. She is still the proprietor of the 9000*l.* stock; she could not be deprived of her property in the stock by the wrongful acts of other persons, without her knowledge or consent. The statutes which create and define the nature of the stock also prescribe the only mode in which it can be legally transferred, and that mode has not in the present case been adopted; her rights are therefore untouched, and her property in the stock is not divested. By the 21 Geo. 3, c. 14, § 18, (a) the power of transferring this stock is directed to be "by entry in the transfer books kept at the bank, which entry is to be signed by the party *making the * 264 transfer, or his attorney authorized by writing under his hand and seal, and by no other mode." The act which

(a) See also 24 Geo. 3, c. 39, § 14.

is supposed to have deprived Mrs. Keating of her property, and conveyed it to another, is merely an unauthorized entry in the bank books, made without the knowledge or consent of the stock proprietor, and without the signature of herself or her attorney. If by such means the property in the stock could be divested, any one, or the entire body, of the public creditors, might in a day be despoiled of their whole fortunes, by the fraud or the negligence of a few clerks in the Bank of England. That company is largely remunerated by the country for performing the duty assigned to them by the statutes; they undertake that duty, and they are bound to the due performance of it. The bank cannot free itself from blame in keeping the public accounts so negligently, that this stock cannot be now traced, by reason of its being mixed up with other stock in the transfer books. If the discovery of the sale of this stock, which took place in 1819, had been delayed a little longer, the plaintiff below would be barred of all action by the Statute of Limitations; so that if her only remedy was by action, she would be wholly remediless. But fortunately for her, the case is otherwise. By the constitution of the public debt under the Acts of Parliament by which it is created, the government are the debtors and obligors in the payment of the annuities stipulated to the parties entitled by original subscription or legal transfer. No act of the government or its agents in the management of the accounts can alter the legal rights of the parties entitled, or change the right of a stockholder from a right to a parliamentary annuity into an action for damages against the

* 265 government or the bank, or any * other party whatsoever. The duty of the government or its agents is merely to conduct as instruments a transaction, founded upon a legal and valid contract, between the stockholder and any purchaser to whom he shall assign and transfer his right. According to the case found by the special verdict, the plaintiff below neither sold nor transferred, nor affirmed any act professing to be a sale and transfer of her stock, in consequence of which the pretended transfer in the books of the bank appears to have been made. No proposition can be more clear than that a creditor, whether of the government

or of a company, or of an individual, cannot be deprived of his right to his stock or debt, unless by some act to which he is by himself or his agent a party, or by the express provision of an Act of Parliament.

We shall now cite to your Lordships the authorities on which we rely in support of these propositions. In the case of *Hildyard v. The South Sea Company*, (a) South-sea stock was transferred by virtue of a forged power of attorney; Sir J. JEKYLL, on a bill in Chancery by the true owner of the stock, declared the transfer void, and ordered the stock, and dividends paid on it after the false transfer, to be taken from the innocent purchaser, and restored to the right owner. In *Monk v. Graham*, (b) Mrs. Monk purchased South-sea stock, and intrusted one Ross with the minutes, to receive the dividends for her; he transferred the stock to Graham, by means of another woman, who personated Mrs. Monk, and signed the transfer, and he complied in all other respects with the requisites of the Act of Parliament applicable to that stock. Graham, after notice from Mrs. Monk of the false transfer, sold the stock, which passed *afterwards * 266 through many hands. In an action of trover brought by Mrs. Monk, the Chief Justice of the Common Pleas directed the jury to find for the plaintiff, which they did. In *Harrison v. Pryse*, (c) which was a bill in Chancery, by the widow and personal representative of Governor Edward Harrison, against the South Sea Company and the executor of another Edward Harrison, who fraudulently sold out 1000*l.* stock of that company belonging to Governor Harrison; after his death the widow discovered the fraud, and by her bill claimed a restoration of the specific stock, or satisfaction; Lord HARDWICKE held her entitled to relief against Pryse, the representative of the other Harrison, to the amount for which so much stock would fetch at the time it was fraudulently sold out. His Lordship added, that he was inclined to think that the company might be liable, in case there was not sufficiency of assets in Pryse's hands; and "his reason was, that the company must be considered as trustees for Governor

(a) 2 P. Wms. 76.

(b) 8 Mod. 9.

(c) Barnadiston, 324.

Harrison, whose stock was transferred without his privity." In *Ashby v. Blackwell* (a) the point came again before the Court of Chancery. Mrs. Ashby was possessed of 1000*l.* Million Bank stock, which her brother, employed to receive the dividends for her, sold out by a forged power of attorney, to the defendant Blackwell. The question was, whether Blackwell or the company were liable to make good the stock to Mrs. Ashby. Lord NORTHINGTON held that the company must sustain the loss, on the ground that they were trustees of the stock, and bound to see to the reality of the authority empowering them to dispose of the stock. The decree in this case was never disputed; the company never hesitated

* 267 to make good the loss. In * *Davis v. The Governor and Company of the Bank of England*, (b) a special action on the case was brought for breach of duty in permitting the plaintiff's stock to be transferred without his authority. On a special case argued in the Court of Common Pleas, it was held that stock placed by a forged power of attorney in the name of another person in the bank books, is not transferred from the owner. Chief Justice BEST, in pronouncing the judgment of the Court, disapproved of the report of *Harrison v. Pryse* in Barnadiston, and seemed to prefer the report of *Harrison v. Harrison*, in 2 Atkins, p. 120, which he said was the same case. Now Atkins reports what he thought the effect of the judgment, and on looking to the registrar's book it will be found that the report in Barnadiston is correct. Chief Justice BEST in that decision examined all the cases on the subject. That judgment was brought by the Bank of England, by writ of error, into the King's Bench (the special case being converted into a special verdict), where it was reversed, not on the merits, but on the ground that as the declaration did not state that the government had issued the dividends to the bank, and there was no proof of that fact, the bank was not bound to pay them until issued. (c) There was nothing in their decision to affect the judgment of Chief Justice BEST upon the merits. In the case of *Hume v. Boland*, (d) which was an issue from the Court of Chancery

(a) 2 Eden, 299.

(b) 2 Bing. 393.

(c) 5 B. & C. 185.

(d) 1 Ry. & Moo. 371.

arising out of these forgeries, and tried in the Common Pleas soon after the case of *Davis v. The Bank of England* was reversed in the King's Bench, Chief Justice BEST says he and the other Judges of that Court had no disposition to recede from their opinion, notwithstanding the reversal. The verdict in that issue was against the banking *partners *268 of Fauntleroy, but it did not bear on this question. Another attempt was made afterwards by the Bank of England to get rid of their liability to the owners of stock transferred by these forgeries, in the case of *Stracey v. The Bank of England*; (a) in which, however, the point was not decided, so that the question remains as it was left by the case of *Davis v. The Bank of England*.

The case of *Hume v. Bolland*, (b) before Lord LYNTHURST and the Barons of the Court of Exchequer, may be cited against the plaintiffs in error, but your Lordships will see that it is not against them. The circumstances there were the same as in the case already cited from Ryan and Moody's reports, arising out of Colonel Bellis's settlement. We are left in the dark as to the opinions of the Judges; and it is a subject of complaint that we cannot, in these cases directed out of Chancery for the opinion of the Courts of Law, have the grounds of the decision of the learned Judges. In the time of Lord MANSFIELD the reporter suggested what he thought the opinion of the Court was. Lord KENYON used to state the grounds of his opinion in open Court. In this case we have only what Lord LYNTHURST throws out in the course of the argument, and as far as that goes it is in favour of the plaintiffs in error. The certificate returned to the Court of Chancery states that the bankrupts (the plaintiffs in error here) were not indebted to the trustees of Colonel Bellis in any sum of money sold out by Fauntleroy's forgeries. The facts of the case of *Ex parte Bolland*, in the matter of *Marsh & others*, (c) which may be cited against the plaintiffs in error, differ very much from this case now before your Lordships, which is precisely the same in its circumstances as *Davis v. The Bank of England*, by *which it is *269

(a) 6 Bing. 754.

(b) 2 Tyrw. 575.

(c) 1 Mont. & M'Ar. 315.

clearly established that no transfer of this stock could be made without the consent of the owner.

It may be argued for the defendant in error that she may elect to affirm the act of transfer by subsequent recognition, although it was originally done without her authority. But in the first place no such affirmance has taken place; on the contrary, the special verdict finds that the act was done without her knowledge or consent, and that she never did assent to it. To entitle her to rely on a subsequent recognition, that fact should have been found; and not being found, it cannot be inferred. Besides, Mrs. Keating cannot at once affirm and disaffirm the same act. It appears by the special verdict that she has insisted on her remedy against the bank, and has actually received the amount of some of the dividends. If the transfer be void by Act of Parliament, is it in her power now to affirm it, and claim the produce of the stock as money had and received? The doctrine of *ratihabitio* does not apply to this case; for although a person may affirm an act done in his name, without his authority, as against the party doing the act, it is because such party is estopped from saying that he has not the authority which he pretended to have, but the person has no such right of affirmance against third persons; and therefore, even if Mrs. Keating could have affirmed the transfer as against Fauntleroy, and treated the produce as money had and received to her use in his hands, she has no such election against Marsh & Co., between whom and herself there was no privity, and who are not estopped from saying that the transfer was without authority, and therefore void. An act merely voidable may be recognized and

* 270 confirmed, * but the transfer here was absolutely void by Act of Parliament, and it is not in the power of the plaintiff below to affirm it to the prejudice of other parties. It was, like a lease under a power or under the enabling statutes, void, because the power or the requisites of the statutes were not complied with, and the lease is not to be set up or confirmed by any act of the lessor. Co. Litt. 215 a, 295 b; *Jones v. Varney*, (a) *Doe v. Butcher*, (b) *Jen-*

(a) Willes, 177.

(b) Doug. 50.

kings v. Church, (a) *Doe v. Watts*, (b) *Comyn's Di. tit. Infant*, c. 7; and 18 Vin. Abr. tit. *Ratihabitio*, p. 188.

Mrs. Keating could not affirm this transfer without returning the dividends. She received them after she knew of the transfer, and she still receives them from the bank. Her agreement with the bank, and her continued receipt of the dividends, is a disaffirmance of the transfer of her stock. She must be held not to affirm while she abstains from any act tending to affirm. *Taylor v. Plumer*. (c) If Mrs. Keating affirm part of this transaction, she must be held to affirm the whole. She cannot say the transfer of the stock is valid, without also recognizing the power of attorney, which is in fact a forgery; a felonious act which she cannot affirm. Had she been a witness on the prosecution of Fauntleroy, she would have sworn that she gave no authority either for the power of attorney or for the sale. The felonious act of Fauntleroy could not be made valid by affirmance, especially against parties not cognizant of the felony, and where the felon has not been prosecuted for such felony; nor was it competent for the plaintiff below to maintain any action, either against Fauntleroy or any person deriving * through him, for restitution of the property divested * 271 by the felony, or any compensation or damages in respect of the felonious act, without having prosecuted the felon. All the authorities on that point are stated in the report of *Ex parte Bolland, in re Marsh & Co.* (d) It was decided for the first time in *Crosby v. Lenge*, (e) that an action for trespass will lie for a civil injury against a person acquitted on indictment for a felonious assault. That case has no application here. The stock being sold by the means of a criminal act, without her knowledge, and she not admitting that it was sold, nor affirming the transfer, so as to put the title to the stock in the purchaser, she cannot have an action for contract or for money had and received. *Horwood v. Smith*, (g) *Dawkes v. Coveleigh*, (h) *Brewer and Gregory v. Sparrow*, (i) *Wilson v. Poulter*. (k)

(a) Cowp. 482.

(b) 7 T. R. 83.

(c) 3 M. & Sel. 562-579.

(d) 1 Mont. & M'Ar. 315.

(e) 12 East, 409.

(g) 2 T. R. 758.

(h) Sty. 346.

(i) 7 B. & C. 310.

(k) Strange, 859.

But if your Lordships should be of a different opinion, then comes the question, — is the firm of Marsh & Co. liable on this action to return the money? The facts found by the special verdict are, that the entry of the money was made in the pass-book with Martin & Co., and never entered in the house-book. To make it affect the firm, it should have been entered in the house-book. The money got out of the house of Martin & Co., as it got in, without the knowledge of this firm. There is no fact found by the special verdict to fix the other partners with a knowledge of this money being paid into the house of Martin & Co.; but it is found that Fauntleroy drew from Martin & Co. considerable sums for his own use, and made false entries in the books of the firm, without the knowledge and in fraud of his partners. We have,

* 272 therefore, a right to * assume that this money got into Martin & Co.'s house without the knowledge of the plaintiffs in error. Suppose, then, a partner of the firm robs one on the high road of a bag of money, and places it in bank to the credit of the firm, and takes it out as he put it in, without the knowledge of his partners; are they to be considered as sharing in the robbery, and liable in an action for money had and received? But it is alleged that the firm received half the commission on this sale, and that that fixes them with a knowledge. That is a mistaken inference; they never had any knowledge of the wrong done, and were not entitled to any benefit from it. The dividends on the 6000*l.* stock were received by Marsh & Co. in consequence of the false credit entered by Fauntleroy, and the firm was paying dividends on the stock in their own wrong. The proceeds of the sale were paid into Martin & Co.; but neither that nor the house of Marsh & Co. can be liable, unless it is shown they had a knowledge that it was improperly obtained; the verdict found that they had no knowledge of the guilty act. In the transaction by which Fauntleroy became possessed of the money paid into Martin & Co.'s as cash *per* Fauntleroy, he did not act as partner of the firm of Marsh & Co., nor for their benefit. Can this money, mixed as it is with other moneys received by Martin & Co. for Marsh & Co., be recovered from the innocent parties? *Clerk v. Johnson*, (a) *Pinto*

(a) 3 M. & Sel. 562.

v. *Santoz*. (a) The money was not obtained on the authority of the partnership, nor in fact applied to its purposes ; it was money which neither actually or constructively was received to the use of Mrs. Keating. It is a mere fiction to treat this money as the money of Mrs. Keating. It is an additional fiction to imply a legal contract from * circumstances * 273 inconsistent with the facts of the case. The money was obtained by a felonious act ; the innocent partners cannot by implication of law be made parties to the wrongful act ; they cannot be liable in contract without fixing them with a knowledge of the transaction ; *Ex parte Aspey in re Allen*, (b) *Ex parte Heaton in re Moxon*, (c) *Ex parte Watson*. (d) The real facts of the case, as found by the special verdict, negative any tortious or beneficial receipt of this money by the firm of Marsh & Co., from which a legal liability to Mrs. Keating can be implied. This being an equitable action, the governor and company of the Bank of England, who are the real claimants, cannot enforce against Marsh & Co. a claim which arises only by means of their own negligence ; no negligence is found in Marsh & Co. ; but even if there were negligence on both sides, the parties are *in pari delicto*, and the rule *potior est conditio possidentis* ought to prevail.

Mr. Sergeant Taddy and *Sir James Scarlett*, for the defendant in error. — The points for consideration are, first, whether it appears by the special verdict that any money was received by Marsh & Co. out of the produce of the stock sold ; secondly, whether, if received, it was received to the use of Mrs. Keating ; and thirdly, whether she has now a right of action against them for that money. The special verdict finds that Mr. Simpson, the stock-broker of Marsh & Co., sold 9000*l.* in stock, to Mr. Tarbutt, for 6018*l.* 15*s.*, which sum he received from Mr. Tarbutt, and paid 6013*l.* 2*s.* 6*d.* thereof, deducting one-half the usual commission, by a check payable to Marsh & Co., into the hands of Martin & Co., to the account of Marsh & Co. It is therefore * 274 found in effect, that the money, the produce of the

(a) Cooper, 197.

(b) 3 Bro. C. C. 265.

(c) Buck, 386.

(d) 2 Ves. & B. 414.

stock, was paid to Marsh & Co. The entry in the pass-book as "cash per Fauntleroy" cannot avail them; neither can the alleged concealment of the pass-book by Fauntleroy. Mrs. Keating had no concern with the mode of transacting business between the two houses; their manner of keeping their accounts cannot affect the rights of third parties. This money was received by the agents of Marsh & Co., and entered to their credit in the accounts between both houses. The jury found by their verdict that Marsh & Co. were ignorant of the forgery—ignorant of the crime only. Mr. Wm. Marsh received dividends in April, 1820, on 6000*l.* stock, as the attorney of Mrs. Keating, having in the preceding October received dividends which became due on her 12,000*l.* stock. In April, 1820, credit was given to Mrs. Keating by Marsh & Co., in their banking account with her, for dividends on 15,000*l.* stock, when they must have known that only 6000*l.* stock stood in her name. We do not charge the plaintiffs in error with a knowledge of the forgery; but we ask how can they, in the face of these acts of Mr. Wm. Marsh, excuse themselves from any knowledge of the sale of the stock? especially when it is found that they received half of the commission on the sale, which half was paid, with the produce of the sale, to the account of Marsh & Co. into the house of Martin & Co., and the accounts between both houses were frequently balanced.

The next question is, whether Marsh & Co. have received the money arising from the sale of this stock, to the use of Mrs. Keating? Were they her agents in the receipt of the produce of the stock? It was urged that there was no privity of contract between them and her to constitute agency.

* 275 It cannot be * denied that Marsh & Co. were her agents in receiving the dividends of her stock; and so far, therefore, there was privity between them. But then they insist that they were not her agents in the sale of the stock, which was effected by felony; and that to treat them as her agents in that transaction, would be affirming a felony, which is unlawful. The policy of the law, having regard to the general welfare, prohibits any compromise for the purpose of saving a felon from prosecution. It is not necessary to explain

that doctrine, as the arguments deduced from it have no force in this case; the felon having been tried, convicted, and executed for another felony. It cannot be denied, that after the felon has been prosecuted to conviction, a civil action may be maintained. *Crosby v. Lengs*, (a) *Dawkes v. Coveleigh*. (b) In this last case, ROLLS, Chief Justice, said, "This is after a conviction, so there is no fear that the felon shall not be tried; but if this action were before conviction it would not lie; there is no inconvenience in the action now; no danger of compounding." So in the present case, the felon being convicted and executed, this action may be maintained against his partners; they may be held liable for the money had and received by the firm, without affirming the felony, without fear of compounding, and without breaking in on the policy of the law. That matter was fully considered by Lord Chancellor LYNDHURST, in his judgment in *Ex parte Bolland* (c) in the matter of *Marsh & Co.*; and by Lord TENTERDEN, in the case of *Stone v. Marsh*. (d)

The form of action adopted here is also objected to; but this objection also is without grounds. There are * several cases to show that it is competent for a party * 276 to sue for the proceeds of his property, in an action for money had and received, and waive the damages for the tort, without affirming the act of the wrong-doer. *Hunter v. Princess*, (e) *Young v. Marshall*. (g) The right to sue, at the plaintiff's option, in tort or contract, is as old as the law; as may be seen in Bro. Abr. tit. Action; Co. Litt. 153 b (n. 7), and §§ 558, 559; and to this effect also may be cited Lord MANSFIELD's elaborate judgment in *Atkins v. Horde*, (h) distinguishing the effects of disseisin and dispossession. Lord TENTERDEN, in his judgment in the case of *Stone v. Marsh*, said, "It was not necessary for the plaintiffs to show that the sale of the stock was made with their authority; for even if made without their authority, and by an act wrongful towards them, they might by law waive the wrong and demand the money,

(a) 12 East, 409.

(b) 1 Sty. 346.

(c) Mont. & M'Ar. 315.

(d) 6 B. & C. 551.

(e) 10 East, 375.

(g) 8 Bing. 43.

(h) 1 Burr. 60.

as is done in many other cases." (a) Notwithstanding these authorities for Mrs. Keating's right to this action, it is still objected that she is estopped; that by her agreement with the Bank of England she has disaffirmed the sale, and therefore cannot now turn round and treat it as an act done with her authority; and the case of *Brewer and Gregory v. Sparrow* (b) is cited in support of that position; the converse only of which is decided in that case. Any treaty between Mrs. Keating and the Bank of England cannot affect the liability of Marsh & Co., who are no parties to that treaty, and have no concern with it. They may put an end to their liability by paying her the produce of this stock; after that the bank will not trouble them.

The plaintiffs in error, relying on the decision of * 277 * the Court of Common Pleas in *Davis v. The Bank of England*, (c) say, that as all the solemnities of the statutes relating to this stock were not complied with, there was no transfer, and therefore Mrs. Keating will find her stock still in the bank books in her name. That case, which stands alone against the decisions both in the Court of Chancery and Court of King's Bench, already referred to, does not go the length contended for. Besides, it should be recollected that it does not stand quite unimpeached. (d) It is impossible to reconcile the parts of that judgment applying to the stock, with that applying to the dividends. The Court of King's Bench held the bank not liable for the dividends. How could the stock, which was as it were the tree, be treated differently from the dividends, which was the fruit?

The special verdict finds that this stock, after the sale, became so blended with other stock that it was impossible to trace and identify it. If the stock could be traced after the fraudulent transfer, the holder thereof would be liable, although innocent of the fraud, which would be a hardship; but it must be admitted that in this case some hardship will appear to be done, whoever will be made liable. The question is not whether the bank or the holder of the stock is liable. It is not necessary, as Lord TENTERDEN observed, in

(a) 6 B. & C. p. 563.

(b) 7 B. & C. 310.

(c) 2 Bing. 393.

(d) 5 B. & C. 185.

his judgment in *Stone v. Marsh* (p. 563), to say whether the plaintiff had or had not remedy against the Bank of England, or against the purchaser of the stock; because, generally speaking, where an injured party has different remedies against different persons, he may elect which he will pursue. But the question substantially is, whether a party found to have received the fruits of * stock by means of a forged * 278 power of attorney, is not liable to the owner for the sum so received. One cannot be allowed to make title through fraud and felony. In the case of *Taylor v. Plumer*, (a) Sir Thomas Plumer did not claim through the fraud or felony of Walsh the broker, but in defiance of them. Suppose a banker receives, under a forged power of attorney, stock belonging to any of your Lordships, is it to be held that the party who forged the power has title to the money produced by the sale of that stock? If the party who forged the power cannot take the money, can the banker into whose house it was paid, or he to whose account it is so paid, lay claim to it, and make title through the felony? The defendants below received the proceeds of this stock through the fraud of their partner, and it is a fallacy to say that they received no benefit from the sale. Suppose Fauntleroy still living, and that no consequence followed from this forgery, and that the money got into the hands of Marsh & Co., would they have a right to retain it against Mrs. Keating, and to say that her remedy is against Mr. Tarbutt or the Bank of England? Suppose that this was plate instead of stock, sold without the authority of the owner, the purchaser may or may not be liable for it, if it be traced to him; but could the partners of the wrong-doer retain it, if traced to them? If the money arising from this sale, and traced to the agents of Marsh & Co., had been paid to them to the private account of Fauntleroy, the case then might be different; but the facts are not so found. We submit, therefore, that your Lordships' judgment on the special verdict ought to be for the defendant in error.

* *Mr. Kelly*, in reply. — The strongest point against * 279 the plaintiffs in error is the fact stated in the special

(a) 3 M. & Sel. 562.

verdict of the payment of the money received from the stock, into the house of Martin & Co. to the account of Marsh & Co., by a check payable to Marsh & Co. That mode of payment was the machinery contrived by Fauntleroy for the better deceiving his partners. That payment was made in 1820; are the partners to be made liable in 1825 for the money so paid by Fauntleroy's direction, without their knowledge, all of which was in the mean time drawn out by him without their knowledge? If Fauntleroy had placed that money with Coutts or any other bankers, and kept up his dealings with it for four or five years, the defendant in error could not claim and follow the money so blended for years with other moneys. *Taylor v. Plumer* (a) is a decisive authority on that point. If the money arising from the sale of this stock had been converted into American certificates, as Sir T. Plumer's money was, and those certificates placed in the banking-house of Martin & Co., it might then be traced and followed, as capable of being distinguished; but this money having been mixed up with other moneys in the numerous transactions of five years, and bearing no ear-mark, could not be so distinguished.

[*Sir J. Scarlett.* — That would be a good argument if the action here was brought in *trover*.]

The next point most urged on the other side was, that the money was received by Martin & Co. not to the use of Fauntleroy, but of Mrs. Keating; whereas the whole course of the transaction showed that it was received to the use of Fauntleroy, by whose direction it was paid in; who alone had knowledge of the payment; who alone dealt with it,
* 280 * and drew it out for his own purposes.

[THE LORD CHANCELLOR. — By the special verdict it is found that Mr. Simpson, the broker, paid the money into the hands of Martin & Co. to the account of Marsh & Co., by a check payable to Marsh & Co.; and the same was entered by them in their pass-book as "Cash per Fauntleroy," on whose behalf the payment was made.]

(a) 3 M. & Sel. 562.

The fact was so, because he had not a private account at the bank of Martin & Co. The money was not received to the use of Mr. Tarbutt, the purchaser; but if the securities which he had purchased with it turned out to be bad, he could maintain an action for his money, and Fauntleroy, if defendant, could not have any defence to such action.

No answer has been given to the two principal points made in behalf of the plaintiffs in error: first, that they had no contract or connection with Mrs. Keating, and were not her agents in the sale of the stock, and therefore an action in assumpsit did not lie, but she may claim against the separate estate of Fauntleroy; and secondly, that while the authority of the case of *Davis v. The Bank of England* is not displaced, Mrs. Keating still has her stock in the bank books, to which she can resort, and to which she has never relinquished her claim.

The Lord Chancellor, in moving the postponement of the case for further consideration, said: That it appeared to him proper to recommend to their Lordships, that, as much of the argument turned on the finding of the special verdict, questions should be put to the learned Judges. A part of those findings stated, that the money arising from the sale of Mrs. Keating's stock was paid in by Simpson to the bank of Messrs. Martin & Co. to the credit of Messrs. * Marsh * 281 & Co., and to their account, and that the same was entered in their pass-book, "Cash per Fauntleroy." Messrs. Martin & Co. were the city bankers of Messrs. Marsh & Co. There was no precise finding of their cognizance of this payment; yet if they were not so cognizant, it was their own fault, inasmuch as the entry of the receipt of the money was in their pass-book, and made in the usual way between the two houses, and inasmuch as they allowed the pass-book to be kept in the desk of Fauntleroy; and although the house-book entries did not tally with that pass-book, they not seeing nor having access to that book, allowing it to remain in the sole possession of Fauntleroy, it must be assumed that they knew of the fact, or if they did not know it, they had themselves to blame for their ignorance of that fact. But as this,

among others, had been and might be the subject of argument, he thought it would be much more expedient that the whole of the findings of the special verdict should be brought to the attention of the Judges.

His Lordship then suggested the points which he recommended to be comprised in the questions, which are stated in the subjoined opinion.

June 9.

Mr. Justice PARK now delivered the opinion of the Judges. The question which your Lordships have been pleased to propose for the opinion of His Majesty's Judges, amounts in substance to this, — whether the produce of stock formerly standing in the name of Mrs. Ann Keating, the plaintiff below, but transferred out of her name on the 29th of December, 1819, without her authority, and under a power of attorney which had been forged by one of the partners of the * 282 defendants below, the bankers of Mrs. * Keating, which partner has been since convicted and executed for another forgery, can, under the circumstances stated in the special verdict, be considered as money had and received by the surviving partners to the use of the plaintiff below, and be recovered by her in that form of action. And after hearing the argument at your Lordships' bar, and consideration of the facts stated in the special verdict, all the Judges who were present at the argument, including the Lord Chief Justice of the Common Pleas, who is absent at Nisi Prius, and Mr. Baron BAYLEY, who has resigned his office since the argument, agree in opinion that such question is to be answered in the affirmative.

The first objection raised against the plaintiff's right to recover, and upon which great reliance has been placed at your Lordships' bar, is an objection which, if allowed to prevail, would be equally strong against the plaintiff's right to recover damages in any form of action and against any person. It is objected that the plaintiff below has not sustained any damage by the alleged transfer of the stock, for that the power of transferring stock is a power given by statute, and the exercise of such power is expressly restrained by the

statute to one mode only, viz. "by entry in the transfer-books kept at the bank;" which entry, it is enacted, "shall be signed by the parties making such transfers, or their attorneys, authorized by writing under their hand and seal," and that no other method of transferring stock shall be good. Inasmuch, therefore, as the supposed transfer of the stock in question has not been exercised by that mode, the entry in the transfer-book kept at the bank not having been signed by the party making the transfer, nor by any attorney authorized by * writing under her hand and seal, it is * 283 contended that it is altogether inoperative; that the stock is not taken out of Mrs. Keating's name, but still remains hers as fully as if no transfer whatever had been made thereof; and the case of *Davis v. The Governor and Company of the Bank of England* (a) is cited and relied upon as an authority directly in point in support of such proposition. But we hold it to be altogether unnecessary, on the present occasion, to discuss the proposition above advanced, or the authority of the case cited in support of it; for although the proposition may be true to its full extent, and the authority of the case above cited in support of it may be free from all doubt or difficulty; still, under the circumstances stated in the special verdict, we are of opinion that the plaintiff below is at liberty to abandon and give up all claim to her former stock so standing in her name, and to sue for the money produced by the sale of such stock as for her own money, which we think has been sufficiently traced into the hands of the defendants below.

It is unnecessary to enlarge upon the extreme difficulty, or, more properly, impracticability, under which Mrs. Keating would be placed, if, as matters now remain, she should elect either to receive the dividends, or to sell her stock; it is sufficient to observe that the special verdict finds, "that when stock is sold, an entry of the transfer is made in the bank books, and the name of the purchaser substituted for that of the seller. The dividend warrants are thenceforth made out in the purchaser's name, who receives the dividend, and the seller's name is no further noticed." Now it is obvious that

(a) 2 Bing. 393.

a transfer under a forged power, or by an impostor,
 * 284 has all the appearance, * and unless impeached by the
 genuine stockholder to the extent to which the same
 can be impeached, the same consequences, as a genuine trans-
 fer; the transferee's name is entered in the bank books as
 the stockholder; the dividend warrants are made out in his
 name; and he, as holder of the warrant, has the right to
 insist upon the payment of the dividends; and in this par-
 ticular case the special verdict finds, "that it is not possible
 to distinguish the accounts to the credit of which the plain-
 tiff's stock, so sold under the power of attorney, now stands."
 If the plaintiff below, therefore, were to apply to receive pay-
 ment of the dividends, or to sell the stock, she would be met
 with a difficulty, insuperable in fact; although the stock may,
 in contemplation of law, still be vested in her, it is certain
 that she could not either receive the dividend or sell the
 stock, until she had first compelled the bank to purchase, *de*
novo, in her name, an equal quantity of the same stock.

Is she compelled to adopt this circuitous process; or is she
 at liberty to abandon all further concern with her stock, and
 to consider the price which was paid by the purchaser for
 that which was her stock, to be her money, and to follow it
 into the hands of the present defendants below?

This, as before stated, appears to us to be the question
 reserved for our consideration; and upon this question, we
 think her at liberty to give up the pursuit of the stock itself,
 and to have recourse to the price received for it, unless any
 of the objections which have been urged at your Lordships'
 bar should be allowed to be available under the particular
 circumstances of this case. The general proposition, that

where a party who has been injured has different reme-
 * 285 dies against different persons, he may * elect which of
 them he will pursue, is not called in question. If the
 goods of A. are wrongfully taken and sold, it is not disputed
 that the owner may bring trover against the wrong-doer, or
 may elect to consider him as his agent, may adopt the sale,
 and maintain an action for the price; but it is objected that
 such general rule will not apply to the present case, on vari-

ous grounds of objection which have been advanced on the parts of the defendants in the action.

Those objections appear to resolve themselves substantially into four: first, it has been urged that the transfer in this case being an act not voidable only, but absolutely void, it is incapable of being confirmed by any voluntary election of the party who has made it; secondly, that at all events, in this case, such election is taken away, upon grounds of public policy; for that the sale of the stock having been made through the medium of a felony, to allow the maintenance of this action would, in effect, be to affirm a sale completed through a felony, and would give the plaintiff a right of action arising immediately out of the felony itself; thirdly, that it does not appear from the facts found in the special verdict, that the money produced by the sale of stock came into the hands of the defendants below under such circumstances as would constitute it money had and received by the defendants below to the use of the plaintiff; and lastly, that by the subsequent transactions between the plaintiff and the Bank of England, she has lost any right of action against the defendants, if she ever possessed it.

The first objection appears scarcely to apply to the present state of facts. It is urged at the bar, that a lease under a power being void, on account of a non-compliance * with the terms of the power, or a lease under the * 286 enabling statutes being void on account of the non-observance of the requisites contained in those acts, such void lease cannot be set up or confirmed by any act of the lessor. But these instances only prove that acts done to confirm the lease itself are nugatory, and that the estate of the lessee remains precisely the same as before such acts of confirmation. Here the former owner of the stock does not seek to confirm the title of the transferee of the stock. No act done by her is done *eo intuitu*; it is perfectly indifferent to her, whether the right of the transferee to hold the stock is strengthened or not. She is looking only to the right of recovering the purchase-money; and if, in seeking to recover that, she does not by her election make the right of the purchaser weaker, it can be no objection that she does not make

it better. In fact, however, the interest of the purchaser of the stock is so far collaterally and incidentally strengthened, that after recovering the price for which it was sold, she would effectually be stopped from seeking any remedy against, or questioning, in any manner, the title of the purchaser of the stock.¹

As to the second objection, it may be admitted that the civil remedy is, in all cases, suspended by a felony, where the act complained of, which would otherwise have given a right of action to the plaintiff, is a felonious act. Upon this ground Mrs. Keating would have lost any right of action, which she could otherwise have had against Fauntleroy for the wrongful sale of her stock, without her authority, by reason of the felony committed by him as the means of selling the stock.

But this principle does not apply to the present case, * 287 upon two grounds: first, none of * the present defendants below had any privity or share whatever in the felonious act. There is, therefore, no felony committed by them, in which the civil right arising against them, supposing it to exist, can merge or be suspended; they are innocent third persons. And secondly, Fauntleroy, the person guilty of the forgery, had suffered the extreme penalty of the law before the action was brought, not indeed for the commission of this particular forgery, but of another of the same nature; and the present plaintiff having given to the bank all the means in her power for prosecuting the felon, it became impossible, without any default in her, that he should be prosecuted and punished for this felony. The case, therefore, falls within the principle laid down by, though not within the precise circumstances of, the two cases that were cited at the bar, *Dawkes v. Coveleigh*, (a) and *Crosby v. Lengs*. (b) As to the argument, that to affirm this sale is to affirm a felony, that point may be considered to have been decided in the cause of *Stone and another v. Marsh and others*, (c) with which decision we entirely concur. Lord

(a) Styles, 347.

(b) 12 East, 409.

(c) 6 B. & C. 551.

¹ If the tort has once been waived, the defendant cannot afterwards be treated as a wrong-doer. *Lythgoe v. Vernon*, 5 H. & N. 180.

TENTERDEN, in giving the judgment of the Court of King's Bench in that case, puts the question, in page 565 of that report, in so clear a point of view, that it will be better to transcribe his words: "It was contended, that the maxim of ratifying a precedent unauthorized act, and taking the benefit of it, cannot apply to a void or felonious act; and that here the plaintiffs were seeking to ratify the felonious act of Fauntleroy, and were making that act the ground of their demand. In this latter assertion lies the fallacy of the defendants' argument. The assertion is incorrect in fact; the plaintiffs do not seek to ratify * the felonious act; * 288 they do not make that act the ground of their demand.

The ground of their demand is, the actual receipt of the money produced by the sale and transfer of their annuities. The sale was not a felonious act, neither was the transfer nor the receipt of the money. The felonious act was antecedent to all these, and was complete without them, and was only the inducement to the Bank of England to allow the transfer to be made." We think, therefore, upon the reason above given, that this second objection falls to the ground.¹

But it is objected, thirdly, that the proceeds of the sale of the stock never came into the hands of the defendants below, so as to be money received by them to the use of the plaintiff; and the consideration of this objection involves two questions: first, did the money actually come into the possession of the defendants? Secondly, if it ever was in their possession, had the defendants the means of knowledge, whilst it remained in their hands, that it was the money of the plaintiff and not the money of Fauntleroy? As to the first point, the special verdict finds expressly, that Simpson, the broker, paid the sum of 6013*l.* 2*s.* 6*d.*, being the amount of the sum received from Tarbutt (deducting one-half of the usual commission), by a check payable to Marsh & Co., into the hands of Martin & Co., to the account of Marsh & Co., at the precise time of such payment; therefore, there can be no doubt but that it was as much money under their control as any other money paid in at Martin & Co.'s, by any customer under ordinary circumstances. The house of Marsh & Co. might have drawn

¹ See *Boardman v. Gore*, 15 Mass. 336-339.

the whole of the balance into their own hands ; if the same money had been paid into Martin & Co.'s, as the produce of the plaintiff's stock, sold under a genuine power of

* 289 * attorney, it would unquestionably have been received by all the defendants to the use of the plaintiff. It would not the less be money received by the partners of the firm, because (as found in the special verdict) it was entered in the account as "Cash per Fauntleroy ;" or because it never appeared in the house-book or any other book of Marsh & Co., but only in the pass-book of that firm with Martin & Co. ; or because it never came into the yearly balancing of the house of Marsh & Co., or in any other manner into their books. Those several circumstances prove no more than that Fauntleroy, one of the partners, deceived the others, by preventing the money from being ultimately brought to the account of the house ; but as between them and the person by the sale of whose stock it was produced, we think the fraud, of their partner Fauntleroy, in the subsequent appropriation of the money, affords no answer after it had once been in their power ; and that it was so, appears to be distinctly stated in the special verdict.

But it is urged, that the present defendants had no knowledge that the money was the property of the plaintiff, being perfectly ignorant, as the special verdict finds, of the commission of the forgery, of the sale of the stock, or the payment of the produce of such sale into their account at Martin & Co.'s. It must be admitted, that they were so far imposed upon by the acts of their partner, as to be ignorant that the sum above mentioned was the produce of the plaintiff's stock ; but it is equally clear that the defendants might have discovered the payment of the money, and the source from which it was derived, if they had used the ordinary diligence of men of business. If they had not the actual knowledge, they had

all the means of knowledge ; and there is no principle
* 290 of law upon which they can succeed in * protecting themselves from responsibility, in a case wherein, if actual knowledge was necessary, they might have acquired it by using the ordinary diligence which their calling requires.

As to the last ground of objection to the plaintiff's right to

recover, it is argued, that by the agreement into which she entered with the bank, and under which she has received, from the time of the sale, the dividends which would have become due, she has disaffirmed the sale with a full knowledge of all the facts, and therefore cannot now be allowed to set it up as a valid sale. But it appears to us that it is sufficient to look at the terms of such agreement to give an answer to the objection. That agreement expressly reserves to Mrs. Keating the right to have recourse either to the bank or the present defendants for her remedy, as she may be advised. It therefore leaves the question whether the sale is affirmed or not completely in uncertainty, until she makes her election to have recourse to the one or other; and the agreement is one which causes no disadvantage to the right of the defendants, who, if liable, can only be liable once to the payment of the money actually received, whether the bank have in the mean time advanced the dividends or not.

Upon the whole, therefore, we beg to state our opinion to be, that upon the question which has been proposed to us by your Lordships, Mrs. Keating has the right to recover the produce of her stock against the surviving partners of the firm who received it, under the circumstances stated in the special verdict in an action for money had and received to her use.

The Lord Chief Justice of the Common Pleas desires it to be expressly understood, that he fully concurs in the opinion now delivered.

* The Lord Chancellor, coming into the House after * 291 the learned Judges had given their opinion on another case, said: I was not present when the learned Judges gave their opinion in the case of *Marsh v. Keating*, which was a case of considerable importance, and on that account was very fit to be brought here; and it was in consequence of that I recommended it should come here, when it was before me in the Court of Chancery. The learned Judges have all agreed in opinion in support of the judgment below. I therefore move your Lordships that that judgment be affirmed; but at the same time without costs, in consideration of the impor-

tance of the question, and the opinion of the Court below having been in favour of taking the sense of your Lordships' House.

Judgment affirmed without costs.

IN CHANCERY. — Before the LORDS COMMISSIONERS. 11 July, 1835.

Ex parte HARE and Others, Assignees ; in the Matter of *MARSH, STRACEY, and GRAHAM.*

Mr. Montagu called the attention of the Court to the petitions which stood in their Lordships' paper for hearing, in this matter. There were nine altogether, but he would only trouble the Court with the last ; the object of which was to put an end to the litigation arising out of the forgeries of Fauntleroy. The judgment of the House of Lords in *Marsh v. Keating* did not decide the question in dispute between the Bank of England and the assignees of the bankrupts, inasmuch as the special verdict on which that judgment was pronounced did not state a most material fact, viz., that the governor and company of the Bank of England had, in January, 1830, caused Mrs. Keating's 9000*l.* stock to be again credited to her in their ledgers, and that from that time she had credit for the same. That fact was not submitted to the learned Judges or the House of Lords. The assignees and the creditors of the bankrupts have, after being well advised on all the circumstances, agreed with the Bank Directors upon a compromise ; and this petition prayed the sanction of the Court to the agreement. He then read the material parts of the petition, which, after stating the proceedings in this Court and in the Court of King's Bench, in respect to Messrs. Gahagan and Stone's and

* 292 *Mrs. Keating's* * proofs of debts against the bankrupts, further stated, —

That all the claims proved and made against their joint estate, in respect to the forgeries of Fauntleroy, amounted to 266,500*l.* ; and that the dividends declared on those proofs in 1831 were 95,559*l.*, which sum was then vested in exchequer bills, in pursuance of the order (a) of this Court.

That in August, 1834, the Bank of England presented a petition to the Lord Chancellor, stating, among other things, that the creditors who proved those debts had assigned their proofs to the bank for valuable consideration ; and praying that the said dividends of 95,558*l.*, with the accumulations of interest thereon since May, 1831, might be ordered to be handed over to the bank.

That the assignees had at the same time (August, 1834) presented a petition, referring to the opinions which were given by the Judges who attended the House of Lords upon the argument of the special verdict ; and stating that the said Ann Keating never had abandoned or given up

(a) *Vide supra*, p. 251.

her claim to her stock, but on the contrary that she, acting for the benefit and at the expense of the Bank of England, made the proof of debt in question with the full understanding, and upon the undertaking of the bank, that such proof should not be a release of, or in any way lessen their liability to replace the stock in specie, and expressly reserving to herself her demand against the bank, whether the proof should fail or be established. And further stating that the Bank of England, being liable in respect of the said transfer in their books, did, on the 21st January, 1830, cause the 9000*l.* three per cent annuities to be again credited to the said Ann Keating in one of their ledgers, and that since that time she has accordingly had credit for the same ; which fact was not submitted for the consideration of the Judges or Peers in the House of Lords, the same not having been known to the assignees at the time when their original petition to expunge the debt of the said Ann Keating was presented ; and the petitioners therefore, by their said supplemental petition, prayed that their former petitions might be again set down for hearing along with that supplemental petition, and that the said Ann Keating's proof might be expunged.

That neither the said last-mentioned petition nor the said petition of the Bank of England, had yet come on for hearing ; but the same, and also the said four other petitions (a) of the assignees for expunging other proofs of debts, were still pending.

That a treaty of compromise had lately been entered into by the petitioners with the governor and company of the Bank of England ; and after much discussion, it had been ascertained that the said governor and company were willing to forego all further claim upon the estate of the said bankrupts, upon receiving out of the funds set apart under the order of the Lord Chancellor before mentioned, * the sum of * 293 95,000*l.* ; and would thereupon consent that the whole of the said proofs and claims made or to be made in respect of the proceeds of stock sold out under powers of attorney alleged to have been forged, should be expunged and released.

That a meeting of the creditors who proved their debts under the said commission, was held on the 16th day of June last, in pursuance of advertisement, in order to receive the report of the assignees in regard to the proceedings which had been taken in resisting the claims against the bankrupts' estate, in respect of the proceeds of stock sold under powers of attorney alleged to have been forged, and to assent to or dissent from an agreement or compromise proposed to be made with the Bank of England, under which the assignees would abstain from further resisting the proofs made against the estate of the bankrupts, in respect of such proceeds as aforesaid ; and the said estate would be wholly released from all further claims, upon payment of a certain sum out of the funds set apart by order of the Lord Chancellor, to answer the dividends already declared in respect of such proofs.

(a) Mentioned in the order, p. 251 *supra*.

That one hundred and twenty-six creditors of the said bankrupts who had proved debts under the said commission attended the said meeting, and all of them, except one, agreed to the resolutions here set forth; and that the debts of the creditors so agreeing amounted to 217,191*l.* 2*s.* 1*d.*, and the debt of the only creditor attending who dissented, amounted to the sum of 583*l.* 8*s.* 10*d.*

That the following are the resolutions so agreed to : " That this meeting assents to the assignees agreeing with the governor and company of the Bank of England to pay to the said governor and company the sum of 95,000*l.* out of the proceeds of the funds, part of the bankrupt estate, vested in exchequer bills, under the order of the Lord Chancellor of the 12th May, 1831 ; upon and in consideration of the governor and company releasing the assignees and the estate and effects of the said bankrupts from all dividends already declared or hereafter to be declared, and all other claims and demands whatsoever in respect of the various sums proved under the commission against the joint estate of Marsh, Stracey, Fauntleroy, and Graham, in the names of various persons, amounting in all to the sum of 234,213*l.* 16*s.* 1*d.*, in respect of the proceeds of stock sold out under powers of attorney alleged to have been forged ; and also in respect of a further debt of the like nature, amounting to 10,778*l.* 13*s.* 10*d.*, and intended to have been brought forward for proof in the names of Sir Edward Stracey and Josias Henry Stracey, and also in respect of two other like debts, amounting together to the sum of 18,221*l.* 12*s.* 6*d.*, proved against the separate estate of the said Henry Fauntleroy ; or in respect of any other debt, claims, or demands whatsoever, against the joint or separate estates of the said bankrupts, any or either of them, for the proceeds of stock sold out under powers of attorney alleged to have been forged. And this meeting hereby fully authorizes and em-

* 294 powers * the assignees to take all such measures as they shall in their discretion think fit for carrying such agreement as aforesaid with the Bank of England into full and complete execution.

That the total amount of debts proved under the said commissions, exclusive of the said sums proved, as hereinbefore is mentioned, in respect of forged stock, is the sum of 563,637*l.* or thereabouts ; and the total number of creditors who have so proved is 1,050 or thereabouts."

The petition prayed their Lordships to confirm the said resolutions, and to order and direct that the petitioners should, out of the said sum of 95,559*l.* 8*s.* 1*d.*, and the exchequer bills wherein the same or any part thereof was invested, and the profits, interest and accumulations thereof, pay to the said governor and company the sum of 95,000*l.* upon and in consideration of the said governor and company, and all other necessary parties, releasing the petitioners and the estate and effects of the said bankrupts from all claims and demands whatsoever in respect of the premises, in the manner mentioned in the said resolutions. And that the petitioners might be at liberty to take all proper and necessary measures for carrying the said resolutions into effect, and that all the surplus and

remainder of the said sum of 95,559*l.* 8*s.* 1*d.* exchequer bills, profits, interest and accumulations, might be transferred and paid to the petitioners as part of the estate of the said bankrupts.

The Lords Commissioners said that they did not see any objection to the prayer of the petition, and they assented to it.

* APPEAL * 295

FROM THE COURT OF CHANCERY.

ATTORNEY-GENERAL v. BRAZEN NOSE COLLEGE.

1834.

| | |
|---|-----------------------|
| HIS MAJESTY'S ATTORNEY-GENERAL, at the Relation of EDWARD, LORD SUFFIELD, and ALEXANDER NOWELL, Esq. | } <i>Appellants.</i> |
| The PRINCIPAL and SCHOLARS of KING'S HALL and COLLEGE of BRAZEN NOSE, in OXFORD, GOVERNORS of the FREE SCHOOL of QUEEN ELIZABETH, in MIDDLETON | |
| | } <i>Respondents.</i> |

Charity Estate. Trust.

Where a fund is given to the members of a corporate body as trustees for the maintenance of a school, if such fund is not given out and out, but only as the trustees may think best to apply it for the advantage of the school, the surplus, after satisfying the exact charge first created upon the fund, belongs to the trustees.¹

The manner in which the donor of the fund, who was the first trustee under the grant by which the school was provided for, conducted himself in the distribution of the fund, is very strong evidence of intention, and may be so treated by the Court in construing the grant itself.²

¹ See *Jack v. Burnett*, 12 Cl. & Fin. 812; *Attorney-General v. Dean & Canons of Windsor*, 8 H. L. Cas. 369; *Mayor of Beverley v. Attorney-General*, 6 H. L. Cas. 310; S. C., 6 De G., M. & G. 256; *Mayor of South Molton v. Attorney-General*, 5 H. L. Cas. 1; *Attorney-General v. Waxchandlers' Company*, L. R. 8 Eq. 452; *College of St. Mary Magdalen v. Attorney-General*, 6 H. L. Cas. 189; *Merchant Tailors' Co. v. Attorney-General*, L. R. 6 Ch. Ap. 512; *Attorney-General v. Rector and Churchwardens of Trinity Church*, 9 Allen, 422.

² As to the effect of usage in the administration of a charity, see *Perry*

July 16, August 13.

THIS was an information filed by the Attorney-General in the Court of Chancery, at the relation of the appellants, against the respondents, on the 18th of June, 1827, to obtain the decree and directions of the Court for the better maintenance and augmentation of the Free School of Queen Elizabeth, at Middleton, in the county of Lancaster; and for the application of the surplus rents, and the fines arising from the charity estates in question in the cause, to those purposes, such surplus income being alleged to be unlawfully applied by the respondents to their own use, or for their general corporate purposes.

* 296 * The case stated by the information was in substance as follows: That by letters patent, bearing date on or about the 11th of August, 1572, and in the fourteenth year of the reign of Queen Elizabeth, after reciting that Alexander Nowell, clerk, Dean of the Cathedral Church of St. Paul's, London, had humbly prayed that, whereas within the parish of Middleton aforesaid, a certain Grammar School anciently held and used, then, from the smallness of the stipend of the head-master of the same, had been deserted, and almost reduced to nothing, she, for the re-establishing of the same school, and also for the better information, instruction, and education in literature of boys and young men dwelling in Middleton aforesaid, Preswick, and Oldham, and the other places thereunto adjoining, should think fit to erect, found, and establish a certain free and perpetual grammar school, which should last for ever, constantly in the same village of Middleton; she, of that singular care which she had for the pious and liberal bringing up of the youth of her kingdom, and of the benevolence with which she cultivated literature, which was of the greatest assistance in imparting and cultivating virtue, and the pursuit of science as well, did will,

Trusts, § 745; Attorney-General v. Murdoch, 1 De G., M. & G. 86; Attorney-General v. Dublin, 38 N. H. 459; Attorney-General v. Rochester, 5 De G., M. & G. 797; Drummond v. Attorney-General, 2 H. L. Cas. 837.

grant and ordain, that by virtue of those her letters-patent, there might and should be for ever, within the aforesaid village and parish of Middleton, a certain free and perpetual grammar school, for the education and instruction of youth therein, and in the neighboring places dwelling, in grammar, which should remain for ever, and be called the free school of Queen Elizabeth, in Middleton, with one master or pedagogue, and one under-master; and whensoever the office or place of master or pedagogue should in future become void, her Majesty willed and ordained that then and so often the aforesaid Alexander Nowell, during his * life, in * 297 the manner therein mentioned, should nominate and appoint; and after the death of the said Alexander Nowell, the principal and scholars of King's Hall and College of Brazen Nose, in Oxford, and their successors, or the principal and the majority of six senior scholars, fellows of the same King's Hall and College for the time being for ever, in the manner therein mentioned, should choose and appoint a man, honest, learned, and fit for the office of master or pedagogue of the free school aforesaid: also her said Majesty did make, nominate, constitute, and incorporate the persons, when so nominated or elected and appointed as masters or pedagogues of the free school aforesaid, in form aforesaid, masters thereof for ever; and that the said masters or pedagogues of the free school aforesaid might and should be one body corporate in themselves in deed and name, by the name of the master of the free school of Queen Elizabeth, in Middleton; and that by the same name they might plead and be impleaded, and every of them might so do in all Courts. The said Alexander Nowell in his life-time, and the principal and scholars of the said college after his death, were declared entitled to nominate and appoint the under-master. And moreover she did will, ordain, and grant, that the principal and scholars of King's Hall and College of Brazen Nose, in Oxford, and their successors, should be governors of the free school aforesaid for ever; and that they and their successors, governors of the aforesaid free school, in deed, fact, and name, should be one body corporate and politic in themselves, for ever, by the name of principal and scholars of King's Hall

and College of Brazen Nose, in Oxford, governors of the free school of Queen Elizabeth, in Middleton, incorporate and established. The principal and scholars were for this * 298 purpose incorporated and * made capable of taking lands, &c., and were to have a common seal, &c. And she did will and ordain, that further there should be, of her own foundation, in the aforesaid King's Hall or College of Brazen Nose, in Oxford aforesaid, above the ancient and accustomed number of sholarships and scholars established in the same King's Hall and College of Brazen Nose, in Oxford, six scholarships or places for scholars, to continue for ever; and that six proper youths, who should have perfectly learned the rudiments of grammar (either in the free school aforesaid, which she chiefly desired, if so many from time to time therein should be found who should have been in the same school for three years at the least, or otherwise in the schools of Whalley or Burneley, in her said county of Lancaster, if so many in the same or any other of them should be found fit, who had been in any other of them for three years at the least; or otherwise, in any other grammar school in her said county of Lancaster), should be joined to the said King's Hall and College aforesaid, from time to time, and unto the same scholarships or places for scholars from time to time should be appointed and constituted, and should enjoy the same for six years and no more, and should be called scholars of Queen Elizabeth, in King's Hall or College of Brazen Nose, and should have a perpetual succession; and that the nomination of such six scholars, from time to time to be chosen into the said King's Hall and College of Brazen Nose aforesaid, should belong and appertain to the said Alexander Nowell as long as he should live, and after his decease to the said principal and scholars of the King's Hall and College of Brazen Nose aforesaid, and their successors for ever, to be nominated and elected in the manner and form in which * 299 the then present scholars, fellows of the same * King's Hall and College, were nominated and chosen. The letters-patent then directed the manner in which the presentation of the said scholars should be made, and commanded that they should be subject to the same statutes and ordinan-

ces as the other scholars of the college, with which college they were incorporated. The letters-patent then recited Alexander Nowell's purpose to establish more scholarships, and gave license to the said Alexander Nowell, his heirs, executors, administrators, and assigns, that he or they, or any one of them, might, and might be able to make, found, erect and establish seven scholarships or places for scholars (besides the aforesaid six scholarships thereby established, and above the accustomed number of scholarships, in the aforesaid King's Hall and College aforesaid, of old appointed), either all together or at different times, in the said King's Hall and College for ever, and to all future times to continue. These scholarships were to be under the same regulations as those previously established, and the said seven scholars were to be elected from Middleton school, or from the schools of Whalley or Burneley, or any other grammar school in the county of Lancaster. Their stipends to be fixed by Alexander Nowell, his heirs, &c.; and power was granted to Alexander Nowell during his life, and to the principal and scholars afterwards, to make ordinances touching the governing and directing the masters, &c., and touching the stipends and salaries of the said master and under-master of the free school aforesaid; and of the scholars in King's Hall and College aforesaid, as well founded as aforesaid or to be founded, and every of them; and also every other thing whatsoever, signified or to be signified, touching and concerning the same free school, and the scholars of the same for the time being, and the order, governance, *preservation and disposition * 300 of the rents and revenues for the support of the said free school and scholars, so that the said ordinances and statutes should not be contrary to the ordinances in those her letters-patent expressed; which said statutes and ordinances, so to be made, she did will, grant and command, firmly and inviolably to be observed from time to time for ever. Her Majesty then granted certain lands to the principal and fellows, governors of the free school of Queen Elizabeth, for the purposes of the school. The premises granted extended to the value of 28*l.* 7*s.* 2*d.* per annum, to hold to the principal and scholars, governors of the free school, and their suc-

cessors, in free alms, paying to the Queen the yearly rent of 8*l.* 7*s.* 2*d.* To this intent, that out of the premises thereby before granted, and of other lands, tenements, rents, and hereditaments in future, to the use of the free school aforesaid, and (a) the scholars aforesaid, and granted to the use of the aforesaid principal and scholars of King's Hall and College of Brazen Nose, in Oxford, governors of the free school aforesaid, or their successors, to be given and granted, the said principal and scholars of King's Hall and Brazen

* 301 Nose, in Oxford, governors * of the free school aforesaid, and their successors, should pay, or cause to be paid, annually for ever, a certain annual stipend of twenty marks, at the least, of lawful money of England, to the aforesaid Edmund Ireland, the then master of the free school aforesaid, and his successors for the time being; a certain annual stipend of ten marks, at the least, of lawful money of England aforesaid, to the aforesaid under-master of the aforesaid free school, for the time being, at the feast of St. Michael the Archangel, and the Annunciation of the Blessed Virgin Mary, or within four weeks next following the said feasts, by equal portions; and to each of the six scholars, by her as aforesaid founded, and to be chosen and elected into King's Hall and College aforesaid, from time to time, five marks of lawful money of England, annually payable at the four periods of the year, &c. And moreover, she gave and granted to the aforesaid principal and scholars of King's Hall and College of Brazen Nose, in Oxford aforesaid, governors of the free school aforesaid, and to their successors, special and free

(a) The passage here was said to be incorrectly translated, the words being, "*Ed tamen intentione*," and it was said that the word *tamen* was put in opposition to the words, "*ad proprium opus et usum*." The whole passage stood thus in the original: "*prædict' principali et scholaribus Aulæ Regiæ et Collegii de Brasen Nose in Oxon', Gubernatoribus liberæ scholæ Reginæ Elizabeth, in Middleton præd', et successoribus suis, imperpetuum ad propriu, opus et usum eorundem principalis et scholariiu', ejusdem Aulæ Regiæ et Collegii de Brasen Nose, Gubernatorum liberæ scholæ præd', et successorum suorum imppm. Ea tamen intentione quod et præmissis concessis, &c. ad usum liberæ scholæ præd', et discipulorum prædcorum, prædictis principali et scholaribus Aulæ Regiæ, Gubernatoribus, &c.*"

license, &c., to receive to them and their successors, after the date thereof for ever (above the premises thereby granted, and above the lands, tenements, and hereditaments whatsoever received, or to be thereafter received, by the aforesaid principal and scholars of King's Hall and College of Brazen Nose, in Oxford, by virtue of any letters-patent, by her progenitors, or any of them, or by their license to the same principal and scholars thereinbefore granted), as well for the better support and maintenance of the free school aforesaid, and scholars aforesaid, those as well thereby founded as those in future to be founded, as for the support of poor students in the said King's Hall and College of Brazen Nose, in Oxford aforesaid, and for further augmenting the number of scholars * or students, as well of her, her heirs and suc- * 302 cessors, as of the said Alexander Nowell, his heirs, &c., or of any other persons or person whatsoever, any manors, &c., within the kingdom of England, or elsewhere within her dominions, which were not held immediately of her, her heirs or successors, *in capite* or otherwise, by military services, if only they did not exceed the clear yearly value of 100*l.* beyond all burdens and reprisals, according to the true yearly value of the same; and to the same Alexander Nowell, his heirs, &c., and to any persons whomsoever that he or they might give, &c., the manors, &c., which were not held for her, her heirs or successors, immediately, *in capite* or otherwise, by military service, of the clear yearly value of 100*l.* beyond all burdens and reprisals, according to the true ancient value of the same, to the said principal and scholars of King's Hall and College of Brazen Nose, in Oxford aforesaid, governors of the free school aforesaid, and to their successors, for the use aforesaid, for ever; by the tenor of those presents likewise she gave special license to have, hold, and enjoy, and in mortmain, to the said principal and scholars of King's Hall and College of Brazen Nose, in Oxford aforesaid, governors of the free school aforesaid, and their successors, to possess for ever as therein mentioned.

The information then stated certain deeds creating the funds necessary for carrying into effect the intention expressed in the letters-patent; most of these were deeds relat-

ing to lands which Dean Nowell had himself purchased. These lands were granted by Dean Nowell to the Queen, and by her second letters-patent were granted by her for the purposes of the charity. This course was adopted in order to avoid the statutes of mortmain.

- * 303 * And the information further stated, that by letters-patent, dated 25 June, 1579, it was witnessed that her Majesty of her special grace, &c., and also at the humble petition of the said Alexander Nowell, gave and granted to the principal and scholars of Brazen Nose, governors of her said free school in Middleton, all that the said lordship and manor of Upbury, and other the hereditaments and premises mentioned and comprised in a certain deed-poll therein referred to, all and singular which premises her said Majesty then lately had, to her or her heirs and successors, of the gift and grant of the said Alexander Nowell, as by the writing of the said Alexander to her made, and in her Chancery enrolled, of record more fully was manifest and appeared, as fully, and freely, and wholly, as any person or persons theretofore having, holding, or being seised of the same, or any parcel of the same, ever had, or ought to have held or enjoyed the same, or any parcel of them; to hold in perpetual mortmain, to possess the said manors, &c., with their appurtenances, to the said principal and scholars of King's Hall and College aforesaid, governors of her said free school in Middleton, and their successors; to hold of her said Majesty, her heirs and successors, in free, pure, and perpetual alms, for ever. And her said Majesty willed also, that the aforesaid principal, and every one of the fellows of the college aforesaid, when they should receive the said letters-patent of her Majesty's said gift, should each separately take an oath in their public assembly, that they would pay over (a) the rents and
- * 304 sums of money which from the said * manor of Upbury and rectory of Gillingham should come into their hands, unto and for the purposes thereafter set forth, for ever, in all times then to come; that is to say, that they would pay

(a) This expression, it was contended, on the part of the respondents, was improperly translated. The word was *impendent*, which was said by them to mean not to "pay over," but to "bestow" or "employ."

every year to each of her said Majesty's thirteen poor scholars, elected out of her free school in Middleton aforesaid, or other schools in her said county of Lancaster, according to her foundation of the said school for their support (a), 3*l.* 6*s.* 8*d.* of lawful money of Great Britain; and to the master of her said free school in Middleton, 23*s.* 4*d.* per annum; and to the under-master of the said school, 3*l.* 6*s.* 8*d.* per annum; as an augmentation or increase of their stipends, by equal portions, every period of three months, or usual quarters of the year. Also, as she understood that the stipends of the principal and fellows of the said college were very small, her said Majesty willed, that out of the said rents and sums of money they should pay 6*s.* 8*d.* every week for the improvement of the commons of the said principal and fellows who should be present in the said college during those weeks, or should be absent on college business; of which sum, every week, 16*d.* should be given to the principal, if present; 10*d.* to the vice-principal, if present; and the other 4*s.* 6*d.* to the fellows who should be present, for the increase of their commons; but if the principal, vice-principal, fellows or fellow, should be absent, and that absence be not on the business of the college, then her Majesty willed that they should give them no part of the said 6*s.* 8*d.* for the time of such absence; but when the principal should be absent, and not on the business of the college, then her Majesty willed that they should give no part of the said 6*s.* 8*d.* for * the time of * 305 such absence; but when the principal and scholars should be absent, and not on the business of the college, the vice-principal then present should receive 16*d.*; and when the vice-principal should be absent, and not on the business of the college, the senior of the fellows who should fill his place should receive 10*d.* above and beyond his share of the said 4*s.* 6*d.*: moreover, her Majesty willed that every principal and fellow at the time of his election or admission, or afterwards, severally should take an oath at the public assembly of the fellows of the college aforesaid, that they would

(a) The words here were *ad ipsorum victum*, which the respondents contended meant "towards their living."

expend (a) the said rents and sums of money for the purposes aforesaid ; and also should take an oath that, as often as any fellowship or fellowships should happen to be vacant, they should choose and admit him or them from among her said scholars aforesaid who should either be superior or equal to the other competitors in erudition, probity of conduct, or piety, into such fellowship or fellowships.

The information stated that the rents under the indenture of 26th October, 1574, together with the conventional rent of 4*l.* 13*s.* 4*d.*, amounting together to 33*l.* 0*s.* 6*d.*, were for several years received by the principal and scholars, and applied by them in payment of the stipends under the letters-patent. But that after the year 1590, the rent of 4*l.* 13*s.* 4*d.* ceased to be so applied, but was applied by them to their own use, they alleging that it was the intention of Alexander Nowell that the same should be unappropriated, and fall into the general revenues of the college. That there was no

* 306 evidence of such intention in the letters-patent. * That the principal and scholars, for several years after they entered into receipt of the rent of 66*l.* 13*s.* 4*d.*, applied the same in payment of the stipends, except certain portions during non-residence, which were improperly applied to their own use. That at Michaelmas, 1686, the principal and scholars entered into possession of the manor of Upbury, and granted leases for short terms, reserving the old rent, and took fines upon renewals, and applied the fines and surplus rents to their own use. That for several years after the date of the letters-patent, the surplus rents were applied in payment of the stipends in support of the thirteen scholarships ; but that in 1700, these thirteen scholarships were reduced and consolidated, notwithstanding which, there had been a deficiency of candidates for the scholarships. And that the stipends unappropriated were applied by the principal and scholars to their own use, or to the general benefit of the college. The information then stated the particulars of what the trust estates consisted, the manner in which the value of

(a) This was another instance of the alleged inaccuracy of the translation. The verb was *impendo*, which it was urged meant to "apply, bestow, or employ."

those estates had increased, and in which the income had been applied. The information alleged that the school-house had been built at the expense of Alexander Nowell, and that it was now in a ruinous state and condition.

The information further stated, that the school consisted of, and was divided into, an upper and a lower school; whereof the upper school contained about forty or fifty boys, who were for the most part taught only reading, writing, and arithmetic, a very few, if any, of the boys being instructed in classical learning, according to what appeared by the letters-patent to have been the primary intention of the said establishment, but which had for a great many years past been wholly, or almost wholly, neglected *and abandoned; * 307 that the lower school contained about sixty or seventy boys and girls, who were taught only reading and writing; and that for their education in the upper school the boys paid to the said head-master the sum of 1*l.* 1*s.* each per quarter; and that for their education in the lower school, the boys and girls paid to the said under-master, in some cases the sum of four-pence, and in other cases the sum of two-pence each by the week; all which payments, together with the subjects and mode of instruction, were alleged by the information to be contrary to, or wholly inconsistent with, the charitable intents and purposes of the founders.

The information further stated, that no scholars had been elected from the school at Middleton for several years past; that the purposes of the charity were neglected, notwithstanding the funds were amply sufficient. It alleged that the respondents were trustees of the whole surplus income, for the benefit of the free grammar school at Middleton, and such other objects of the founder's bounty as were still capable of being carried into effect. But that they had for a century ceased to apply the income of the charity, except to pay the stipends of the master and under-master.

And the information therefore prayed, that the rights of the charity, in respect of the several matters mentioned in the information, might be ascertained and declared; that all proper directions might be given for the establishment and maintenance of the charity, and for the increase and augmen-

tation of the said establishment, by and out of the charity estates; and that an account might be taken of the estates belonging to the charity, or which were then subject to the trusts thereof, and of what was due in respect thereof

* 308 from the respondents, in their capacity of * governors of the free school of Queen Elizabeth at Middleton; and that what should be found due from them might be answered and paid by them; and that it might be referred to one of the Masters of the Court to approve of a scheme for the application thereof, and for the better regulation of the charity in future, and the administration of the charity estates, and the application of the funds and income of the charity to the purposes so to be declared respecting the same; and that in the meantime a receiver might be appointed of the charity estates, with the usual directions.

The answer of the respondents admitted the letters-patent and other documents, and admitted the possession of the estates. The answer then stated that the rents, amounting to 20*l.* per annum, under the first letters-patent, were applied in payment of the stipends of the master and under-master. That from 1589, the rent of 66*l.* 13*s.* 4*d.*, which was also reserved on the subsequent lease, was also duly applied, except as to some parts of such stipends, which were allowed to fall into the general revenue of the college; and afterwards the disposition thereof was regulated by A. Nowell. That the endowment of thirteen scholars failed of taking full effect. That there was no time when the scholarships were filled from Middleton school. That in consequence of that circumstance, other students were nominated by Nowell; and that as early as 1609, birth in Lancashire became a sufficient ground of eligibility. That as the respondents believed that the number of scholars could not by any remedial means be kept full, they did about the year 1700 effect a consolidation of twelve of the scholarships into one; that the consolidated stipends were paid, except during vacancies.

* 309 * That the thirteenth scholarship was usually vacant; and that the surplus, after answering the prescribed payments, was used for the general benefit of the college, in

the same manner as it had been during the life of Dean Nowell himself.

The answer further stated, that the rent of 4*l.* 13*s.* 4*d.* was applied towards the finding of the Queen's scholars until 1590, when the principal and scholars came into possession of the rents and profits of the manor of Upbury, when Dean Nowell, considering it unappropriated, allowed it to fall into the general revenues of the college; and afterwards, in 1590, 1591, and 1592, Dean Nowell applied to the principal and scholars to pay it to one of his relations, and which was done for those three years, and the money itself had been ever since disposed of as part of the unappropriated revenues of the college.

The answer further stated, that the defendants had constantly allowed the master of the school to hold and enjoy the lands attached to it. That the stipends to the master and under-master had been duly and regularly paid. That no scholars had been elected from Middleton to Brazen Nose during the last twenty years; but by reason that the registries of the said college, though they regularly noticed the elections and dates of the elections of scholars, did not, except occasionally, indicate from what school they came, the respondents did not know and could not set forth whether, during the space of the last century, any scholars had been elected from the said school at Middleton to Brazen Nose College aforesaid; but they believed that in all such elections a preference had been given to such candidates, if any, as presented themselves from schools within the scope and directions of the said *grant. And the *310 defendants stated they did not believe that it was the intention of Queen Elizabeth or of Dean Nowell that the whole of the trust property should be applied for the sustentation of the school, but that Brazen Nose College was an equal object of Dean Nowell's bounty; and they supported this allegation by reference to the conduct of Dean Nowell himself, with respect to the appropriation of the funds. They further alleged that Alexander Nowell was educated at Brazen Nose, was a fellow of the college, and subsequently to the second letters-patent became principal thereof, and during the

time he was such principal the surplus of the rents was taken by the college for its own proper use. They submitted that he purposely limited the stipends, in the expectation that the rents would not be increased, nor the stipends altered; and that he meant and intended that the contingent advantage which might accrue from a fine upon the renewals of the lease of the said estates, in case the same should progressively increase in value, would and should be retained by the principal and scholars of the said college, and applied to the general use and benefit thereof; and therefore that he gave no direction for the application of any future surplus. And that, accordingly, the surplus of such rents and profits had from the very earliest time, when the said principal and scholars of Brazen Nose became possessed of and entitled to the same, been applied and administered for the general benefit of the said college, and its advancement as an institution of classical learning, without control or opposition by the said Alexander Nowell during his lifetime, and without being at any time challenged or called in question. And the said defendants

did humbly insist upon such uniform enjoyment and * 311 administration as evidence * of the intention of the said grant, and of the founder of the said charity; and they did submit that such use and administration was an application thereof to a charitable purpose, and consistent with the general purposes of the said grant, and ought not to be disturbed. And the defendants by their answer further stated, that the oath in the said letters-patent of 1579, required to be taken by the principal and fellows of the said Hall and College of Brazen Nose, had never been taken; and that the same, so far as regarded a preference to be given to the said Queen's scholars in the election of fellows of the said college, was inconsistent and irreconcilable with the original statutes of the said college and the oath required by the founders thereof; and that accordingly another form of oath was, as appeared by the said registry, substituted by Dean Nowell, in lieu of that directed to be taken by the letters-patent.

That the charity estates were considerable, but not of the value of 3,000*l.* per annum: that Nowell treated the chapel of Lynginge as the property of the college: that the defend-

ants were not intended to be trustees of the estates for the benefit of the school, beyond the amount of the several stipends: that the trust property had never been misapplied: that it was the universal practice of colleges to apply for their general corporate purposes the surplus arising from grants to them, after payment of the particular charges thereon; and any interference with this rule, established for centuries, would cause great confusion and distress in all the older colleges of both universities. That such application ought not to be disturbed.

The answer of the principal and scholars to the amended information, stated that arrears of rent were remitted by the college to the tenants, at the request of Alexander Nowell: that scholars were admitted on *condition * 312 that they should not be entitled to any salaries until the same should be received by the college: that Nowell in his life-time always treated the college as the chief object of his bounty: that when he was alive, the college with his consent took the surplus rents, and applied them to the general purposes of the college: that Nowell introduced the custom which had since always been followed, of electing students from other places than those mentioned in the letters-patent: that the thirteen scholarships continued to be filled for some time with persons either elected from the school or substituted according to the intent of Nowell: that for a considerable time previous to 1712, there had been a great deficiency of candidates, and about that year the principal and scholars did consolidate the stipends of twelve of the scholarships, which they might have retained on the ground of their being vacant: that they reserved the thirteenth as evidence of the original stipend: that 109 persons had been in the enjoyment of the charity between the years 1700 and 1799: that the school-house was built originally by Dean Nowell, but had since been repaired by the parish of Middleton: that the funds of the charity had always been applied to purposes consistent therewith: that the evidence of Dean Nowell's wishes was to be found in the letters and petition of Alexander Nowell, now in the British Museum, and to which they referred. These letters were set out in an appendix; the

strongest expressions in them were quoted in the course of the argument.

A replication having been filed to these answers, issue was joined ; and on the 16th December, 1831, the Master of the Rolls dismissed the information without costs. The case was then brought by appeal into this House.

* 313 * *Mr. Bickersteth* and *Dr. Lushington* (with whom was *Mr. Blenman*), for the appellants. — The respondents are not entitled to apply the surplus of the rents to their own use, but are bound to apply them to the purposes specified in the letters-patent ; and the matter ought to be referred to the Master, to approve of a proper scheme for the application of these funds. That is the object of the present information ; and if it is not intended that the principal and scholars of Brazen Nose College should take the rents for their own profit, in opposition to the direct terms of the charter by which the school was founded, the decree of the Master of the Rolls must be reversed. By the letters-patent, thirteen scholarships were instituted ; these have been consolidated by the college into two ; one scholar only has been appointed, and the remaining scholarship has been vacant for a great length of time. The question is, whether such an appropriation of the funds can be sanctioned by law ; the solution of that question must depend on the contents of the letters-patent. The circumstances under which the letters-patent were granted will perhaps assist in their construction. At the time they were granted, Brazen Nose College was a body corporate. It was unnecessary, therefore, for the purposes of the college itself, to declare it a body corporate, since it had long borne that character ; these letters-patent created it a body corporate for the special purpose of its becoming the perpetual trustee of this school. There had been an ancient school in Middleton, at which Dean Nowell and his brother had been educated. Dean Nowell afterwards became principal of Brazen Nose College, and died in 1602. At his instance the power of the Crown was put in motion, and the great and leading object he had in view was to

* 314 restore and re-establish * the ancient grammar school to

which he had formerly belonged. The letters-patent show this intention, for they recite that in consequence of certain circumstances the school had decayed. For the purpose of restoring it, certain lands were given, and certain powers were vested, first in Dean Nowell, and afterwards in the College of Brazen Nose. The college was established as a body corporate, but it was so established, with regard to the school, solely for the purpose of executing these powers. Its corporate capacity, so far as the school was concerned, was expressly given to it for the purposes of the school, and for no other purposes whatever. The college could not be intended to be benefited by the grant of these powers, since they were given to it, not in its ancient collegiate and corporate character, but given to the principal and fellows in their special corporate character, as governors of the free school of Queen Elizabeth in Middleton. This is an important circumstance, and yet the Master of the Rolls has treated it in his judgment as a matter more of form than of substance; and with the single observation that it is so, has dismissed it from his notice. It is clear, however, that the college, in its ancient corporate character as one of the colleges of the University, is perfectly distinguishable from the college in its new corporate capacity, as the body entrusted with the maintenance of Middleton school. What is the natural inference from the manner in which the six scholarships are appointed, and then the seven more, and then the directions as to the way in which the scholars shall be selected, and the schools from which they shall be selected, and also as to the power of disposing of the revenues? Any one who reads these parts of the letters-patent must be satisfied that the * stipends should at a future time undergo such * 315 alterations as circumstances should render necessary.

The concluding part of the passage as to the disposition of the revenues, shows that Brazen Nose College was not to take any part for its own advantage, but that such revenues were to be wholly applied for the support of the free school and scholars of Middleton. The plain meaning of this part of the letters-patent is, that the principal and fellows of the college became the trustees for the support of the free school. The

next passage states the amount of the rents to be 28*l.* 7*s.* 2*d.*, and grants them to "the principal and scholars of the College of Brazen Nose, governors of the free school of Queen Elizabeth in Middleton, for the proper advantage and use of the said principal and scholars, governors of the free school aforesaid." In that passage the principal and scholars of Brazen Nose are not spoken of merely as such, but as governors of the free school, in which latter character, and in that alone, these revenues were granted to them. It is the same in other parts of the letters-patent. The limitation of twenty marks to the master and ten marks to the under-master, by the addition of the words "at the least," was not meant to be a limitation applicable for ever, but was made at that moment because of the smallness of the sum then capable of being appropriated to the support of the school. There is in the letters-patent a permission to take other lands besides those originally granted, of the clear yearly value of 100*l.* a year, "as well for the better support and maintenance of the free school aforesaid, and scholars aforesaid, those as well thereby founded as those in future to be founded, as for the support of poor students in the King's Hall and College of Brazen Nose." It is not possible to contend that the college

* 316 is to * take the whole of this sum, when the chief part of it is thus distinctly given for a specific purpose. It is erroneously imagined that the letters-patent are silent as to the distribution of the fund. There are, on the contrary, most distinct declarations in them upon that subject. The second letters-patent, granted in 1579, must be taken as forming part of the same instrument with those which preceded them. The estate of Upbury was purchased by Dean Nowell out of his private funds; he leased it out, and was desirous of applying its revenue to the benefit of this school. To secure the proper administration of these funds, an oath is required from the principal and fellows of Brazen Nose, that they would pay over the rents and sums of money for the purposes thereafter set forth, for ever. What were those purposes? The payment of a master and under-master, and the support of the free school at Middleton. A small sum only, after these other payments had been made, was devoted

to the purposes of Brazen Nose College; a sum to be used when the other payments had been made, and not till then. The rents last granted by the charter must be considered as a mere addition to the sum previously given; but the grant of them cannot be treated as an extinction of the power and authority already created, and the duty already imposed on the college. Contemporary usage signifies little if unwarranted by the terms of the grant. [THE LORD CHANCELLOR. — In the Thetford case, the distribution of the property was clearly provided for, and the case went on that ground. That case is not so well reported in Duke's Charitable Cases as in Coke's Reports. The parenthesis in your second reason endeavours to avoid all the effect of that case, as to the consequence of there being a sum greater * than * 317 that which is specifically appropriated. Contemporary usage is not always *optima interpret legum*; but if it is shown, as it seems to be here, that the donor permitted, without objection, a certain usage with regard to the surplus funds for a number of years, that is rather strong proof of what was intended.] But in this case it is not conclusive proof; for the donor here allowed the sum of 4*l.* 13*s.* 4*d.* to be given for a period of three years to one of his poor relations, yet he did not intend to make such a gift perpetual to any relation or the descendants of any relation. Recourse must therefore be had to the instrument itself, which will show the intention of the donor to have been to provide for the maintenance of this free school, in preference to any other object. Besides, whatever may have been done with these surplus funds in past times, if done contrary to the provisions of the letters-patent, it is an abuse, and cannot be supported. The Statute of Limitations will not run against a charity, and therefore no right can be established as against it by mere usage.

Sir E. Sugden and Mr. Bethel, for the respondents. — In the construction of an ancient instrument, contemporary usage ought to be taken into consideration where ambiguous expressions are used. The donor in this case manifested his intentions not only by his own application of these funds, but by documents relating to them. In the appendix there is a

letter from him to Lord Burghley, in which the donor uses these expressions: "I do beseech your honor to finish this good work, and at your convenient leisure to move her Majesty to license the same of one hundred pounds, or so many marks at the least, by me and others to be purchased

* 318 in mortmain, for the increase * of the stipends of the schoolmaster and usher, and of the number and exhibition of the said scholars, and the better relief of the great company of that poor college." And in p. 44, in another letter, he says: "I have dealt with my Lord Cheney to purchase his interest for the term of his life, that I might put the college in full possession as well of the rents as of the lands." All these things show that the great object of Dean Nowell was to benefit the college, with which he was at the time more immediately connected than with the school. The rent of 4l. 13s. 4d., and the right of presentation to the vicarage of Lynginge, were both treated by Dean Nowell himself as belonging to the college; for he requested the college to grant the first for three years to a relative of his own, and he asked for one turn only to be allowed by the college to present to the vicarage; thus in both instances treating the right of disposition as in the college alone. It must be admitted that much depends on the construction to be given to the second letters-patent; but what is the effect of that construction here? The object of the first letters-patent was to make a new endowment for the grammar school. It was not a new foundation: independently of the second letters-patent, a provision had already been made for it. It is quite clear that the nature of the school could not be altered; yet if persons did not choose to send their sons to this school, the number of scholars going from it to the college must of course be but small. As, however, it could not be converted into a school to teach any thing but what the letters-patent described, the college is not to be reproved for the fact that it received but few scholars from the school. Indeed, as scholars did not come in the manner anticipated, the college took the twelve scholarships and consolidated them into one, and left the

* 319 thirteenth as it was, in the hope * that some would come for the two exhibitions. The college, therefore,

executed the donor's intent *cy pres*. One scholarship was left open for any one to come and take it, yet none came. The first letters-patent had for their object to increase the income of the master, but they do not bear the construction now attempted to be put upon them as to this point. The letters themselves define the amount which shall be allowed to the master; and the clause relating to this matter only directs the manner in which this purpose shall be executed, but gives no power to the college to appropriate all the revenues for the accomplishment of the object. If there had been any intention to dedicate the whole property to a particular charity, that might have been effected by half a dozen words. That, however, has not been done; nor is it shown how those who are to have the power to make statutes for the regulation of the school are to give up all that power. It is clear that this power was, after Dean Nowell's death, always to be vested in the hands of the principal and scholars of Brazen Nose. The title of the principal and scholars of the college being confirmed by the Queen, they received from her a license to hold the lands in mortmain. This shows the intention to invest them with a permanent property in the lands, and authority over them.

[THE LORD CHANCELLOR. — Both the dean and his brother expressed their especial favour towards Brazen Nose College, and requested the Queen not to forget it.]

The object of providing for the poor scholars was best obtained by enriching the college on the foundation of which these poor scholars were to be supported. The whole amount of the profits under the first grant was very small, being little more than 24*l.* * and a fraction: under the second * 320 grant the revenue was much improved, but in those letters-patent the Queen only acted ministerially. The external circumstances may be looked at by the House, but we do not contend that violence must be done to the particular instrument; that is not necessary here. In construing these letters-patent regard must be had to the intention of the donor; this intention is manifested by his acts. If both the inten-

tion and the words agree, the intention may be at once effectuated. Now what was the intention of Dean Nowell, after the first provision for his wife? He knew that he was settling property which would not in the first instance do more than answer the object of the particular donation he had in view; but when his wife's interest fell in, that there would be more than sufficient to effectuate that object. There was but a limited provision at first, but afterwards the beneficial interest was secured entirely to the college. These acts must be allowed to have great weight and force in the construction of the instrument. The intention of Dean Nowell is shown by the terms he uses; when he speaks of a general expense, he then says *impendere*; but when he speaks of a particular application of the funds to the object of the scheme, he says *solvere*. In the oath again, the word *impendere* is used, and it is used in the same sense. In *The Attorney-General v. The Mayor of Bristol*, (a) which depended on a gift by Sir Thomas White, Sir JOHN LEACH, then Vice-Chancellor, established the right of the charity in the property; but his judgment has since been in effect overruled by that of Lord ELDON. (b) Even the Vice-Chancellor, however, recognized the difficulty arising from the fact that all the fund was not

* 321 disposed * of, and said: (c) "The present case differs from the Thetford School case and the Coventry case, in this, that the whole actual rents and profits were there in the first instance applied; here the covenant is to apply less than the actual rent." When the case came before Lord ELDON, he said: (d) "In former times the Court acted upon principles in the construction of deeds and wills, when charity was the object, which, if they could be reconsidered, would not now be adopted. If the doctrine of resulting trusts had then been understood, the right of the heir would never in all probability have been got over." His Lordship added: "The doctrine in the Thetford case, which has been adhered to since, was, that if the whole land, and rents of it at the time, are given for a charity, those to whom the lands are given must, if there is an increase in the rents, apply them

(a) 3 Madd. 319.

(b) 2 Jac. & W. 294.

(c) 3 Madd. 351.

(d) 2 Jac. & W. 307.

to the charitable purpose." There is no clause in the present case giving the whole of the lands, and the rents arising from them, to the school alone; and therefore the argument founded on it cannot apply here. Then as to the usage here not being a bar to the claim: As to the question of usage, in *The Attorney-General v. The Mayor of Coventry*, (a) Lord HOLT observed: "My brother POWELL says, that there is no statute of limitations which runs against a charity. I do agree there is no statute of limitations shall bar a charity but in a thing that is obscure and dark; and there hath been an enjoyment for a long time: I think an enjoyment for a long time, without interruption, is a great evidence of a right." In *The Attorney-General v. The Mayor of Bristol*, Lord ELDON, speaking on the same subject, (b) adopted * the * 322 same view, and said: "If between the periods I have mentioned the surplus was applied by the corporation to their own use, the construction of this deed, by which it was contended that no more was meant by it than that these particular disbursements and payments should be distributed to these respective corporations, would receive consistence from the prior enjoyment." And again, (c) after reading the case of *The Attorney-General v. Coventry*, from Vernon's Reports, he said: "The statute of limitations undoubtedly does not apply; but length of time (though it must be admitted that the charity is not barred by it) is a very material consideration as to what is the effect and true construction of the instrument." The practice which has so long prevailed with respect to the funds in this case — a practice beginning with the life of Dean Nowell himself — must, under these authorities, be taken into account in construing this instrument. That practice is warranted by the declared objects of the instrument itself. The first of these objects was to confer a benefit on the principal and scholars, by the improvement of their commons; and, instead of allowing the stipends of the absent scholars to be forfeited, Dean Nowell suggested that the stipends of the absent scholars should make those of the resident scholars more rich. That fact shows that the late

(a) 3 Madd. 368.

(b) 2 Jac. & W. 314.

(c) 2 Jac. & W. 381.

dealing with the revenues was neither improper in itself, nor unwarranted by the donor's intention, nor by the ancient practice. On every mode of looking at the case, — first, upon the general doctrines of the Court; secondly, upon the authority of the particular cases referred to; thirdly, on the plain construction of the letters-patent; fourthly, on * 323 the expressed intention of the founder; fifthly, on * the contemporaneous conduct of the parties in the application of the property; and lastly, on the undisturbed enjoyment of this property for so long a period, — it is impossible to find any ground on which the prayer of this bill can be held to be sustained.

Mr. Bickersteth, in reply. — This is a case in which the whole of the property given for the purpose of maintaining a particular charity, is not applied to the purpose intended by the donor. Mere usage, however long existent, is not sufficient to defeat a clearly expressed intention. In the cases referred to, where the usage was employed to assist in the construction of the instruments, it was so employed because the instruments themselves were not clear and distinct as to the appropriation of the surplus. That is not the case here. Even the letter to Lord Burghley, quoted on the other side, shows what a strong feeling Dean Nowell had for the school at which he had been educated; and the lands are given to the college, not for the benefit of the college, but for the purposes of the school. The bounty to the college must be viewed with reference to the maintenance of the school. It never was the idea of Dean Nowell to allow the school to go to decay; his first wish was to provide for that; and the school being provided for, he was willing that the college should receive some advantage from his bounty. But he required first that the school should be well provided for, and even the powers given to the college were given with the sole view of being used for the benefit of the school.

August 13, 1834.

THE LORD CHANCELLOR. — My Lords, the case of The Attorney-General and Brazen Nose College is the first of
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those which now stand in the list for judgment. * It * 324
was argued with the fulness and learning and ability
which your Lordships are accustomed to see applied to cases
at your bar, and the application of which was specially
merited by the importance of it; the case not only involving
a question of considerable interest to the college, but also a
matter of principle, not only important in itself, but doubly
so as being likely to operate by way of precedent in other
cases. It will not be necessary for me to enter very minutely
into the argument, because, on the whole, I agree without
hesitation in the decision of the Court below; nevertheless,
I shall state my reasons why. The charity was founded as
far back as the 14th of Elizabeth, the 11th of August,
1572, and it may be said to have been in some sort a joint
foundation by Alexander Nowell, Dean of St. Paul's, a great
benefactor of it, and one of its governors and visitors, and
by her Majesty Queen Elizabeth. The object of the founda-
tion was the restoration and the reinstatement of the school
of Middleton, in Lancashire, as a free grammar school; and
this is effected by making the master and the school a corpo-
rate body, and by appointing governors and visitors, namely,
the master and six senior scholars, fellows of Brazen Nose
College, Oxford, and making them also a body corporate,
under the title of the master and six senior scholars, fellows
of King's College, Brazen Nose, Oxford, governors of Middle-
ton grammar school. The charter then points out that six
scholarships shall be appointed to Brazen Nose, either from
Middleton school, the school of Whalley, in Lancashire, or
the school of Burneley, in Lancashire; and failing all those
three, from other schools in Lancashire: that they shall be
chosen by the master of the college; and that then
there shall be power given to this master, * and six * 325
senior scholars, fellows of the college, the governors
of the school, with Dean Nowell during his life-time, and
by themselves after his decease, solely to make ordinances
for governing the school and scholars, and concerning and
touching the stipends and salaries of the said masters of
the free grammar school aforesaid; and also touching any
thing whatsoever relating to the said school, in the order,

governance, receiving, and disposition of the rents and revenues for the support of the school and scholars. This is a very important part of the endowment; for it appears to me, upon the authority and principle of adjudged cases, one which I very lately decided (in Chancery), proceeding on the same principles, the Atherstone school case, in which I reversed the judgment of the Court below, where due attention had not been given to such provisions as appeared to me of the utmost possible importance to the main question, which was similar to that now in agitation between these parties, to wit, whether the whole was given to the school out and out, or whether the school had only a charge upon the revenues in a certain way, but at the discretion of the governors, so that the surplus would belong as property to the governors. It then gives rents of considerable value to the governors, *ed tamen intentione*, with this intent, however, that out of the same they give to the master twenty marks by the year, "at the least," to the under-master ten marks by the year, "at the least," and to six poor scholars five marks by the year, but not "at the least." That is, the minimum is to be twenty and ten marks respectively, as a yearly stipend to the master and usher of the school, but there is no minimum fixed as to the scholars: it is stated to

be five marks to the scholars; and so far I mention
 * 326 this, as operating to a certain degree (though * it was not much relied upon at the bar) to a certain degree in favour of the argument of the respondent. Nevertheless, it is nothing decisive, for it must be observed that these scholars had nothing to do with Middleton grammar school at all; nothing exclusive, for they may belong to Whalley, or Burneley, or in the event of neither Whalley nor Burneley furnishing objects of charity to make scholars to Brazen Nose, sufficient exhibitions and scholarships should be given to whomsoever (that has been the practice formerly) the masters should so choose; they have the choice. There is, then, a very important liberty to be observed upon; liberty is further given to hold other grants in mortmain, not exceeding 100*l.* a year, in the usual way, for the support of the school, but not of the school alone, but also for the support of the

poor scholars of the said College of Brazen Nose. That is also the second observation which I have to make on the distinct contemplation by the Queen and the founder, of its not being confined to the school of Middleton, as it is now contended the endowment does confine it. Now, when I have stated these facts, and one other thing, I think I shall have stated the whole case, and shall have disposed of it; that during Dean Nowell's life he acted as visitor, and he was to a great degree the founder; and during the whole of that time, with his knowledge, with his consent, and with his participation, the surplus was applied to the use of the college; and even the stipends of the scholars, when there was a want of objects, that is to say, when they could not get in any way six poor scholars, the profits of those poor scholars were applied to the use and benefit of Brazen Nose College, without the least reference to Middleton school. One other fact being stated, I shall have done as regards the * facts * 327 of the case. The rent was at that time, at the very least (for that is the minimum) 66*l.* 13*s.* 4*d.* a year, by the foundation accounts; summing them up, you will find that sum: the charges upon it were not 66*l.* 13*s.* 4*d.* but 65*l.* 3*s.* 4*d.*, leaving a clear surplus ungiven away, unappropriated by the foundation, not referred to in anyway by the gift, except by a resulting gift to the donee, to the governors, I mean, and visitors, namely, 1*l.* 10*s.* This is said to be a trifling amount. I do not consider it a trifling amount; now it may be so; but it was no such trifling amount then, when you find that that which was 66*l.* 13*s.* 4*d.* in the 14th of Elizabeth, is now, by the very contention on the part of the appellants, on which they rely mainly, swelled to somewhere between 700*l.* and 800*l.* a year. I must consider that we are to multiply 1*l.* 10*s.* by something like fourteen or fifteen, and that brings us up to between 20*l.* and 30*l.* Now not only is it not inconsiderable then, regard being had to the value of money, but you must consider the proportion it bears to the whole income, and it is somewhere about a thirtieth or fortieth part of the whole income.

Upon all these grounds, therefore, I found my first observation; namely, that this is not within the principle, within the rule, of the Thetford case, the celebrated case, now the gov-

erning rule in all such cases, and reported in Lord COKE's Reports, but which is also to be found reported in Duke, though not so correctly; and I use this remark for this reason, because Lord ELDON, in some of the charity cases which came before him, commenting on the Thetford case, is led into an error respecting the nature of that case; and when you come to examine the error, it is quite clear he is led astray by having

taken the case from Duke and not from Coke; think-
* 328 ing that Duke gave the * report (as he generally does)

the same as Lord COKE does, Lord ELDON conceived he might safely take it there. It is accurately given in Coke, it is not so accurately given in Duke; and upon the difference between the two reports, hinges almost entirely, in my opinion, what I venture, with great respect to that noble and learned Lord, to state to be an erroneous view which he took of the Thetford case. The Thetford case goes on this principle, that where nothing is said of surplus (for it is only in cases where nothing is said that the question can arise), where nothing is said of surplus, then you may safely assume that it is given to the charity out and out, and not to the trustees, if it is not exhausted by the gift to that charity. Suppose, for instance, as in the Thetford School case, I give land to the amount of 20*l.* by the year (stating the revenue) to A. and B. in trust for the charity C.; if I give 15*l.* to one, 3*l.* to another, and 2*l.* to a third master or other party in the charity, and will and declare that those three sums of 15*l.* a year, 3*l.* a year, and 2*l.* a year respectively, shall at all times be paid to such persons; as those all taken together amount to 20*l.*, I must be taken to give all that to the trustees A. and B. for the sole use of the charity. The rule of the Thetford case, under such circumstances, is this, that this exhaustion of the fund indicates the founder's intention that the whole shall be charity fund, and none should be beneficiary to the trustees. It disposes, therefore, of the whole, and raises no implied trust *quoad* the surplus in the trustees for the school; it disposes of all possible surplus, and leaves no question of this description ever in such a case to arise. But it is very different, when, instead of giving 15*l.*, 3*l.*, and 2*l.*, I give 15*l.* and 3*l.*, and leave 2*l.* unappropriated. There the rule of the Thet-

ford case * does not apply at all; there you have * 329 given 18*l.* out of the 20*l.*, and the whole argument and the principle and the rule in that case consequently does not apply. Therefore, my first argument on the present appeal is, that the defalcation of the 1*l.* 10*s.* not given, takes it out of the rule in the Thetford case, and leaves it to rest on the other and general principles governing such questions.

Now then, what is the intention in the second place? I infer that intention from the two circumstances I have already stated, namely, that the Middleton school is not the only object of the bounty of the founder, but the six scholarships to Brazen Nose are included therein; and those six scholarships to Brazen Nose are not to be taken from Middleton school lads solely, but may be filled from the schools of Whalley and Burneley, which are not mentioned in the endowment; and failing Whalley and Burneley, may also be taken from other schools. The other circumstance of a similar description is, that the poor scholars are to receive the benefit of Brazen Nose quite independently of Middleton, or even Whalley or Burneley, or even Lancashire scholars at all; they are to receive the benefit of the other lands to the amount of 100*l.* a year; to take which in mortmain, and hold which in mortmain, license is also given.

Then the other circumstance which I have to state, my Lords, is this, that the rules and regulations and ordinances which the governors are empowered to make, are perfectly general; all matters touching the school and its concerns are from time to time to be varied by those ordinances; and they are to be specifically directed to the revenues, receipt, management, and disposition of the said revenues.

Last of all, my Lords, comes the lapse of time. Two * hundred and fifty years have elapsed since the foun- * 330 dation of this charity, and there is no trace pretended to be visible of any other application of the surplus except to Brazen Nose College. This may not be decisive, but it is a very strong circumstance in the case, as I shall have occasion to show in the case of *The Attorney-General v. Hungerford*, (a) to which, therefore, I adjourn that remark. It raises

(a) *Post*, 357.

not an absolute bar, but a great obstacle, to any alteration to be made in the practice of disposing of the fund. My Lords, the Coventry case, (a) the case of *The Attorney-General v. The Mayor of Bristol*, and other cases to which I might refer, both more and less recent, clearly bear out the principle on which this decision has been come to; and therefore I have no hesitation whatever in moving your Lordships that this decree be affirmed, though without costs.

Decree affirmed accordingly.

FROM THE COURT OF KING'S BENCH.

MAYOR, &C., OF LYME REGIS v. HENLEY.

1834.

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| The MAYOR and BURGESSES of LYME | } | <i>Plaintiffs in Error.</i> |
| REGIS | | |
| HENRY HOSTE HENLEY, Esq. | | <i>Defendant in Error.</i> |

The King granted by letters-patent to the mayor and burgesses of Lyme Regis, the borough so called, and also the pierquay or cob, with all liberties and profits, &c., belonging to the same, and remitted part of their ancient rent payable to the King; and he willed that the mayor and burgesses, and their successors, all and singular the buildings, banks, sea-shore, &c., within the said borough, or thereto belonging, or situate between the same and the sea, and also the said pier, &c., at their own costs and charges thenceforth for ever should repair, maintain, and support.

Held by the Lords, affirming the judgment of the Courts of C. P. and K. B., that the mayor and burgesses, having accepted the letters-patent or charter, became legally bound to repair the buildings, banks, and sea-shore; and that this obligation being one which concerned the public, an indictment would lie against them in case of non-repair, and

(a) 2 Vern. 397; and afterwards in the House of Lords, 7 Bro. Parl. Cas. 235.

an action on the case for a direct and particular damage sustained by any individual.¹

May 21, June 25.

ACTION on the case by the defendant in error against the plaintiffs in error, for damages sustained by him through their neglect to repair, according to their charter, certain sea-banks, &c. The declaration in the first count stated that on the 20th

¹ See *Parnaby v. Lancaster Canal Co.*, 11 Ad. & El. 228; *Mersey Docks v. Gibbs*, and *Mersey Docks v. Pierce*, 11 H. L. Cas. 686; S. C., L. R. 1 H. L. 93; *Eastman v. Meredith*, 36 N. H. 284, 289-296; *Riddle v. Proprietors of Locks & Canals on Merrimac River*, 7 Mass. 169, 187, 188; *Carlthen v. Franconia Iron and Steel Co.*, 99 Mass. 216, 218; *Pittsburg City v. Grier*, 22 Penn. St. 54; *Mayor, &c., of New York v. Furze*, 3 Hill, 612; *Bailey v. Mayor, &c., of New York*, 3 Hill, 531; *Lloyd v. Mayor, &c., of New York*, 5 N. Y. 369; *Mears v. Wilmington*, 9 Ired. 73; *County Commissioners v. Duckett*, 20 Md. 468; *Weightman v. Washington*, 1 Black (U. S.), 39; *Nebraska City v. Campbell*, 2 Black, 590; *Foreman v. Canterbury*, L. R. 6 Q. B. 214; *Dillon Munic. Corp.* 736, § 778; *Angell & Ames Corp.* (9th ed.), § 383; *Conrad v. Ithaca*, 16 N. Y. 158; *Barton v. Syracuse*, 36 N. Y. 54. But it has been held that a private action cannot be maintained against a town, or other quasi corporation, for a neglect of corporate duty, unless such action be given by statute. *Mower v. Leicester*, 9 Mass. 247; *Riddle v. Proprietors of Locks & Canals on the Merrimac River*, 7 Mass. 169, 187; *Holman v. Townsend*, 13 Met. 297, 300; *Brady v. Lowell*, 3 Cush. 124; *Adams v. Wiscasset Bank*, 1 Greenl. 361; *Oliver v. Worcester*, 102 Mass. 489, 496; *Reed v. Belfast*, 20 Maine, 248; *Eastman v. Meredith*, 36 N. H. 284; *Commissioners of Hamilton County v. Mighels*, 7 Ohio St. 109; *Ward v. County of Hartford*, 12 Conn. 404; *Pray v. Jersey City*, 32 N. J. 394; *Freeholders v. Strader*, 3 Harr. (N. J.) 108; *Bigelow v. Randolph*, 14 Gray, 541, 543; *Dillon Munic. Corp.*, 716-723, §§ 761-765. In the above case of *Bigelow v. Randolph*, 14 Gray, 543, Mr. Justice METCALF said: "This rule of law, however, is of limited application. It is applied in the case of towns only to the neglect or omission of a town to perform those duties which are imposed upon all towns, without their corporate assent, and exclusively for public purposes, and not to the neglect of those obligations which a town incurs when a special duty is imposed upon it, with its consent express or implied, or a special authority is conferred on it, at its request. In the latter cases, a town is subject to the same liabilities, for the neglect of those special duties, to which private corporations would be, if the same duties were imposed or the same authority conferred on them—including their liability for the wrongful neglect as well as the wrongful acts of their officers and agents."

of June, in the 10th year of the reign of Charles I.,

* 332 that King by his letters-patent did, for * himself, his heirs, and successors(amongst other things), give, grant and confirm to the mayor and burgesses of Lyme Regis, and their successors, the borough or town of Lyme Regis, and also all that the buildings, called pierquay or cob of Lyme Regis, with all and singular the liberties, privileges, profits, franchises, and immunities to the same town, or to the said pierquay or cob, in anywise belonging; to have, hold, and enjoy the aforesaid, &c., to the said mayor and burgesses, and their successors, to the only and proper use and behoof of them and their successors, in fee farm for ever, yielding of fee farm to the said sovereign lord Charles I., his heirs and successors, of and for the aforesaid borough or town, with its liberties and franchises, as in the said letters-patent in that behalf mentioned: And the said sovereign lord Charles I. did further, for himself, his heirs, and successors, pardon, remise, and release to the said mayor and burgesses, and their successors for ever, twenty-seven marks, parcel of thirty-two marks of the farm of the said borough, and the liberties thereof, anciently by letters-patent, or in any other manner due, the said lord King Charles I., willing not that the same mayor and burgesses, or their successors, or either or any of them, should be charged of the further portion of the aforesaid farm of thirty-two marks, besides the aforesaid five marks; but that they and their successors, against the said King Charles I., his heirs and successors, should be thereafter acquitted, and from time to time for ever discharged of the aforesaid yearly twenty-seven marks, any statute, act, ordinance, provision, charters, or letters-patent theretofore made to the contrary thereof in anywise notwithstanding: And that the said mayor and burgesses, and their successors, all and

* 333 singular of the buildings, banks, sea-shores, and * all other mounds and ditches within the said borough of Lyme, or thereto in anywise belonging, or situate between the same borough and the sea, and also the said building called the pierquay or cob, at their own costs and expenses thenceforth from time to time should well and sufficiently repair, maintain, and support, as often as it should be neces-

sary or expedient: And the said King Charles I., by his said letters-patent, did grant to the said mayor and burgesses, and their successors, that the mayor of the same for the time being for ever thereafter should be clerk of the market within the said borough, and the liberties and precincts of the same; and that the said mayor and burgesses, and their successors, all and singular the fines, amercements and sums of money before the said clerk of the market, by either or any of the inhabitants of the borough or town aforesaid, after the date and making of the said letters-patent, forfeited or thereafter to be forfeited and assessed in the same borough, should have and enjoy to the use of them and their successors for ever, without account, or any other thing for the same to the said King Charles I., his heirs or successors, in anywise to be rendered or paid: And the said King Charles I. did, by the said letters-patent, for himself, his heirs, and successors, give and grant to the said mayor and burgesses, and their successors, full power, authority, and license from time to time for ever to dig stones and rocks in any places whatsoever, within the borough and parish of the town aforesaid, out of the sea and on the sea-shore, in the borough and parish aforesaid, adjoining to the said borough or town, for the reparation and amendment of the port and building called the pierquay or cob, and other necessary reparations and common works of the same town and borough, and belonging * and apper- * 334 taining to the buildings aforesaid: And the said King Charles I. did also, by the said letters-patent, will and grant to the said mayor and burgesses, and their successors, that they should have, hold, use, and enjoy, and might and should be able fully, freely, and entirely to have, hold, use, and enjoy for ever, all the liberties, free customs, privileges, authorities, acquittances, and licenses aforesaid, according to the tenor and effect of the said letters-patent, without the let or impediment of the said King Charles I., his heirs or successors, or his or their justices, sheriffs, escheators, bailiffs or ministers. — Which said letters-patent the mayor and burgesses aforesaid duly accepted, and the same thence hitherto have been, and still are, one of the governing charters of the said borough; and the said mayor and burgesses, from the time of their

acceptance of the said letters-patent, hitherto have had, held, received, and enjoyed all the benefits, profits, and advantages granted to them by the said letters-patent.

The declaration further stated, in the first count, that before and at the time of the committing of the grievances as thereinafter mentioned, the said plaintiff (the defendant in error) was lawfully possessed of and in divers messuages, buildings, and closes of land, with the appurtenances, situate in the borough aforesaid, and was entitled in reversion to divers other messuages, buildings, and closes of other land, with the appurtenances; all which several messuages, &c., with the appurtenances, before and at the times of the committing of the several grievances thereinafter mentioned, were abutting in or near the sea-shore, at the parish aforesaid; and that before and at the times of sealing of the said letters-patent,

and acceptance thereof, as aforesaid, by the said mayor * 335 and burgesses, * and also at the time of the committing of the several grievances by the said defendants (plaintiffs in error) as thereinafter next mentioned, divers buildings, banks, sea-shores, and mounds, had been, and were then respectively standing and being within the borough of Lyme Regis aforesaid; and divers other buildings, banks, sea-shores, and mounds, had been and respectively were belonging and appertaining to the said borough; and divers other buildings, banks, sea-shores, and mounds, had been and were at those times respectively standing and being and situate between the said borough and the sea, in the borough aforesaid; all which said buildings, banks, sea-shores, and mounds respectively, at the times of the committing of the several grievances by the said defendants (plaintiffs in error), were near to, and then and there constituted and formed, and were a protection and safeguard, and still of right ought to form and be a protection and safeguard to the said several messuages, buildings, and closes of land, with the appurtenances aforesaid, and then and there hindered and prevented, and still of right ought to hinder and prevent, the sea, and the waves and waters thereof, from running or flowing in, upon, against, or over the said several messuages, buildings and closes of land; and all which buildings, banks, sea-shores, and mounds, the

said defendants (plaintiffs in error), at the times of the committing of the several grievances by them as thereafter mentioned, were, under and by virtue and in pursuance of the aforesaid letters-patent, and the acceptance thereof as aforesaid, liable, and ought, at their own proper costs and charges, well and sufficiently to have repaired, maintained, and supported, and still are liable, and ought, at their own proper costs and charges, well and sufficiently to repair, * maintain, and support, when and so often as it should * 336 or might have been, or shall or may be necessary or expedient so to do, so as to prevent damage or injury to the said messuages, buildings, and closes of the said plaintiff, by the sea, or the waves or the waters thereof.

Breach, that the said defendants, well knowing the premises, and not regarding the said letters-patent, nor their duty in that behalf, but contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said plaintiff, and to deprive him of the use and benefit of his several messuages, buildings, and closes; and also to injure, prejudice, and aggrieve him, the said plaintiff, in his reversionary interest of and in the said messuages, buildings, and closes above-mentioned, wrongfully and unjustly suffered and permitted the said buildings, banks, sea-shores, and mounds to be and continue ruinous, prostrate, fallen down, washed down, out of repair, and in great decay, for want of due, needful, proper, and necessary repairing, maintaining, and supporting of the same; by means of which said several premises, the sea, and the waves and waters thereof, ran and flowed with great force and violence in, upon, under, over, and against the said several messuages, buildings, and closes of the said plaintiff, in which he was so interested as aforesaid, and thereby greatly inundated, damaged, injured, undermined, washed down, beat down, prostrated, levelled, and destroyed the said several messuages and buildings; and the materials of the same, together with divers cart-loads of earth and soil, and divers acres of the said several closes, were washed and carried away; by means of which said several premises, the said plaintiff not only lost and was deprived of the use, benefit, and enjoyment * of his said messuages, build- * 337

ings, and closes in this count first above mentioned, but was also thereby greatly injured, prejudiced, and aggrieved in his reversionary estate and interest of and in the said several messuages, buildings, and closes in this count secondly above mentioned.

There were other counts stating a liability to the same repairs by prescription, and others stating it by reason of the possession of certain closes. The defendants below pleaded the general issue.

The cause came on to be tried before Mr. Justice LITTLEDALE, at the spring assizes for the county of Dorset, in 1828, when the jury found a verdict for the defendant in error, on the first count, with 100*l.* damages, and were discharged from giving any verdict upon the other counts. In the following Easter term, a motion in arrest of judgment was made in the Court of Common Pleas, but judgment was given for the plaintiff below. (*a*)

The defendants below thereupon brought a writ of error in the Court of King's Bench, where the judgment of the Court of Common Pleas was affirmed; (*b*) and upon that judgment the present writ of error was brought in the House of Lords.

The following Judges of the common-law Courts, besides Lord DENMAN, attended in the House when the case was argued, viz.: Chief Justice TINDAL, Mr. Justice PARK, Mr. Baron BAYLEY, Justices BOSANQUET, GASELEE, TAUNTON, J. PARKE, PATTESON, and ALDERSON, Barons VAUGHAN and GURNEY.

Mr. Serjeant Merewether, for the plaintiffs in error.—

There is nothing on the face of this record to show that * 338 the defendants below were liable, by reason of * tenure, to the repairs of the sea-shore. The passages cited from Callis, in his treatise on sewers, and urged in the Court below, with a view to fix the liability of the defendants *ratione tenuræ*, are doubtfully expressed and cannot be deemed authority. He says: "In cases of the sea and royal rivers, the property of the banks and grounds adjoining belong to the subject whose lands do butt and bound thereon, but the

(*a*) 5 Bing. 91.

(*b*) 3 B. & Ad. 77.

soil of the sea and royal rivers appertains to the King," &c., "and it seems that the frontages are bound to the repairs, and that he whose grounds are next adjoining to a highway is bound to repair the same." The last clause of the sentence is stated too broadly, and is not the law; and the former part of it, which applies to this question, is an expression of doubt, and is much weakened by passages in other pages. (a)

The chief question here is, whether the King can by his letters-patent or charter create a new duty? It does not appear who, or that any one, was compellable to repair those walls and banks before the date of Charles the First's charter. Did the King's charter create a new duty, and impose on the corporation of Lyme the charge of repairing the sea-walls, subjecting them to an indictment or action at the suit of any person whose property in Lyme might be damaged in consequence of the non-repair? The liability to such action or indictment could arise only in one of four ways, viz., by reason of prescription, tenure, Acts of Parliament, or nuisances to public rights. There is no case or other authority to show it could arise from the acceptance of a grant from the King. The cases cited in the Court below, in the judgment for the defendant in error, applied to liability by prescription, tenure, Act of Parliament, or public nuisance; * such * 339 as *Rex v. Kerrison*, (b) *Paine v. Partridge*, (c) 12 Hen. 7, fol. 18; *Rex v. Inhabitants of Kent*, (d) *Rex v. Inhabitants of Lindsay*, (e) *Rex v. Stoughton*. (g) If the charter annexed to the grant an obligation to repair the sea-walls, the King may withdraw the grant if the grantees do not perform the condition, Roll. Abr. tit. Franchise, Com. Dig. Franchises; so that the obligation is not a matter of public duty, but a covenant between the King and the corporation, which a stranger to it cannot have a right to enforce by action or by indictment. The liability of the plaintiffs in error to an indictment for non-performance of the repairs in question,

(a) See Callis, pp. 2, 115, 117, 118.

(b) 1 M. & Sel. 435, and 3 M. & Sel. 526.

(c) Carth. 191; S. C., Show. 255.

(d) 13 East, 220.

(e) 14 East, 317.

(g) 2 Saund. 157, 160.

is assumed in the judgment below, as the ground on which the right of action for special damage rests. (a) According to Callis, (b) the occupiers of lands abutting on the sea are primarily liable to protect them from the sea, and the liability of the plaintiffs in error to protect the defendant, if such exists, arises from their agreement, implied from their acceptance of the charter of Charles the First; but no agreement to become liable to do that for which others are primarily liable will subject a party to an indictment, though the party be a corporation aggregate, and though a sufficient consideration for the agreement be shown, and the public interest be concerned, *Rex v. Mayor of Liverpool*; (c) nor will such agreement release those in whom such primary liability exists, *Regina v. Duchess of Buccleugh*. (d) The charter here is at most only a covenant between the King and the corporation;

it is not denied that an obligation is thereby imposed * 340 on the * corporation, but there is no duty of a public nature imposed, so as to render the corporation liable to an indictment for neglect. There is no authority for holding that any one of the King's subjects, who may sustain damage by reason of the non-repair, can indict the corporation for their neglect, or have an action against them for the damage. The claim of the defendant in error is new and unwarranted by law; and that no precedent is found for the right claimed by him, is a matter which ought to have great weight. The case of *Popham v. Prior of Breamore*, (e) and *Keighley's Case*, (g) do not appear to sustain this action, as they turned on the principle of liability by prescription. In the case of the *Mayor of Lynn v. Turner*, (h) on which reliance was placed on behalf of the plaintiff below, and which was a writ of error to the King's Bench, the corporation of Lynn was sued for not repairing a creek of the sea, being charged to be liable thereto by prescription and by immemorial usage, two material distinctions between that and this case. More weight has been given to the words of Lord

(a) 3 B. & Ad. 93.

(b) P. 115.

(c) 3 East, 86.

(d) 1 Salk. 358.

(e) 11 Hen. 4, 82.

(g) 10 Rep. 139 a.

(h) Cowp. 87.

MANSFIELD, in giving judgment in that case, than is properly due to them. It would appear from the argument in *Churchman v. Tunstal*, (a) that an action or indictment lies against a common ferryman if he does not keep his ferry in good repair, but that a private ferryman is not so liable; a distinction which is analogous to this case. But that case and *Paine v. Partridge* (b) were cases of liability from prescription in respect of ancient ferries, which most materially distinguish them from this case. It may be supposed from an expression used in *Russell v. The Men of Devon*, (c) that the action there for not repairing a county * bridge * 341 would well lie if the defendants had been a corporation. That was a mere dictum, urged in that case beyond its merits, and it is opposed to *The King v. The Mayor of Liverpool*, (d) and to *Harris v. Baker*. (e)

There was another class of cases cited below, relating to the liability of officers in public offices, as the bank, post-office, &c.; but as the liability of these officers arises under Acts of Parliament, it is not necessary to examine such cases, which have no bearing upon the liability to which it is attempted to subject the plaintiffs in error, by virtue of the King's charter within time of memory.

The proper remedy for the injury sustained here would be by information at the suit of the Attorney-General, or by application to the Court of Chancery, under the Act 43 Eliz. c. 4, which enables the Lord Chancellor, where lands have been granted for reparation of sea-walls, &c., to issue a commission to inquire and direct the funds to be appropriated to the purposes to which the grant was destined; or by proceeding on the part of the King for a forfeiture. 4 Vin. 476; Com. Dig. tit. Franchises.

Mr. Erle rose to argue on the same side, but the Lord Chancellor suggested that the House should hear the counsel for the defendant in error, and *Mr. Erle* should have the reply. The counsel agreed to that course, and *Mr. Bere*,

(a) Hardr. 162.

(b) Show. 255; Carth. 191.

(c) 2 T. R. 667.

(d) 3 East, 86.

(e) 4 M. & Sel. 27.

who was second counsel on the other side, did not address the House.

Mr. Follett, for the defendant in error. — The first point made in the argument for the plaintiffs in error is, that no condition to repair was imposed as a matter of public
 * 342 duty on the mayor and burgesses by * the grant; and that the charter contained merely an expression of the King's will, that they should repair and maintain the banks and sea-shore. It is impossible for any person, attending to the nature of the grant, the remission of twenty-seven marks of the ancient rent, the grant of the fines and amercements, and the license to dig stones within the town for the reparation of the port and pier, to hold that the charter did not annex to these grants the obligation to repair. The corporation having accepted the charter, and having ever since enjoyed the privileges conferred by it, must also take the burden imposed. The benefits that were granted were the consideration for the performance of the duty. The corporation shall not be at liberty to accept the grant, and refuse the burden; *King v. Westwood*, (a) *Brett v. Cumberland*. (b) Lord TENTERDEN, after citing this last case in his judgment in the Court below adds: "So here, though the letters-patent import only that it be the King's will that the corporation should repair, yet they, having accepted the letters-patent, and enjoyed the benefits and advantages granted thereby, have testified their assent that this shall be considered as a condition or obligation, and must be bound accordingly; and in that view it becomes immaterial to inquire whether or not, before the grant, the King himself was bound to keep the banks and sea-shores in repair." (c)

The plain argument upon which the defendant in error relies is, that where the King by his grant imposes a public duty on a corporation or on an individual, the public become interested, and have a right to see that the duty is
 * 343 performed, and an indictment * will lie for the neglect; or an individual, if a direct injury is in consequence

(a) 4 B. & C. 781.

(b) Cro Jac. 399, 521.

(c) 3 B. & Ad. 92.

sustained by him, has a right of action. This last position was admitted in the case of *Paine v. Partridge*, (a) and is well warranted by the cases of *Churchman v. Tunstal*, (b) *Herbert v. Paget*, (c) *Mayor of Lynn v. Turner*, (d) *Lane v. Cotton*, (e) and Comyn's Digest, title Action on the Case, A 2, A 3. The recent case of *Peter v. Kendal* (g) applies to every offence and grant of a public nature, and shows that wherever such a grant is made, there a duty is imposed, and an indictment will lie against the grantee for a public injury arising from his neglect or non-performance of the duty; or an action on the case may be brought against him by any individual sustaining a particular injury. The doctrine laid down in these cases is not shaken but rather confirmed by the case of *Russell v. The Men of Devon*, (h) which was an action against the inhabitants of a county for an injury sustained by an individual in consequence of the non-repair of a county bridge, and it was held not to be maintainable; but it was there said that such an action would well lie against a corporation.

The next question for consideration is, whether the declaration here sufficiently alleges that the defendants below were bound to repair *ratione tenuræ*. There is no magic in these words. They were in possession of the borough, and of the walls and banks; that cannot be denied after the verdict. By reason of their ownership and possession they became liable to the repairs, (i) and the declaration sufficiently alleges that liability to have been created by the * charter, and does not aver an obligation more exten- * 344 sive than the duty required by the charter. The case of *Rex v. Kerrison*, (k) cited on the other side, favours the defendant in error. The indictment there charged the owner of a navigation with the liability to repair a bridge by reason of ownership, without showing any contract or obligation annexed to the grant of the navigation, to induce a liability

(a) Shower, 255; S. C., Carth. 191.

(b) Hardr. 163.

(d) Cowp. 86.

(g) 6 B. & C. 703.

(i) Callis, 115, 117.

(c) 1 Lev. 64.

(e) 1 Salk. 17.

(h) 2 T. R. 667.

(k) 1 M. & Sel. 495.

to repair; but here the grant, and the condition on which the charter was granted, are set forth in the declaration; and whether the duty is cast on a party by prescription, which supposes a consideration, or by an existing grant showing the consideration, if the party bound do not repair, an action equally lies at the suit of the party injured by the neglect. *Keighley's Case.* (a) These cases are strongly applicable to this, and they, as well as most of the authorities to be found in the old books of reports, are against the interpretation which was given by the counsel for the plaintiffs in error to the Statute of Sewers (23 Hen. 8). There is a case in Hardres, (b) (*The Earl of Devonshire v. Gibbons and others*), referring to that statute; it was a bill reciting articles of agreement made between the King and others, for draining Hatfield-level, by which the King was to have a third part of the lands obtained, the drainers a third, and the tenants and commoners a third. The plaintiff, who was not a party, or deriving from a party, to the articles, was assessed towards maintenance of a certain sewer for his lands in Yorkshire, and his bill prayed relief from the assessment, according to the equity of the statute of Hen. 8, on the ground that he was "aggrieved by the assessment, through those not repairing the banks, who were obliged to repair by the articles."

* 345 And the Court *seemed to be of this opinion, "because in effect the articles were made for the relief of all that were to receive any damage by the draining; and being made *pro bono publico*, all persons are parties; as if one man should take upon himself to repair a public causeway which the country ought to repair, by this means he makes himself liable to the whole county if he do it not." There is a clear distinction between the liability of an individual and of a corporation; that is laid down in Callis, p. 117 (where it is said an obligation may exist by covenant as well as by tenure), and is noticed by Lord MANSFIELD in his judgment in the *Mayor of Lynn v. Turner*. An individual is bound by reason of tenure of his land; but a corporation accepting a grant is bound to perform the duty annexed to it, without any land. It is not therefore necessary that the obligation

(a) 10 Rep. 139 a.

(b) p. 169.

to repair should be in this case coupled with land ; but if it were, the charter does grant land, it grants the borough and cob ; so that if it were necessary to prove that the corporation are bound *ratione tenuræ*, that proof is not wanting.

Mr. Erle, in reply. — The plaintiffs do not contend that the covenant contained in the letters-patent did not, by the acceptance of them, impose an obligation on the corporation ; there may be a process against them for the forfeiture of the franchise, or other proceedings before referred to, but they are not liable to an indictment or action at the suit of an individual who is a stranger to the covenant. There is no case, though many have been cited, to show that any one of the King's subjects can have an action against a corporation for not repairing sea-walls, through the non-repair of which his property sustained damage. The * case of * 346 the *King v. The Mayor of Liverpool* shows that an agreement to repair a road did not subject a corporation to an indictable liability to repair. That case is a sufficient answer to the inferences drawn from *Callis* and from the old authorities. In all the cases respecting the duty of public officers there were known relations and duties between them and the public, defined by Acts of Parliament, and they have no analogy with this case. The charter here cannot have a greater force than an Act of Parliament ; but if this duty was imposed in those general terms by Act of Parliament, the corporation would not be indictable for an injury to a private individual. The banks and mounds in question were stated in the declaration to have been a protection to *Mr. Henley's* property, and not to the houses and property of the public. It was scarcely possible at any expense to repel the encroachments of the sea on these banks ; if the funds of the corporation were to be applied to the protection of one individual, they would not be sufficient for that purpose, and the other inhabitants would be without protection.

The Lord Chancellor suggested a question for the learned Judges, and the further consideration of the case was adjourned.

June 25.

Mr. Justice PARK delivered the following opinion of the Judges: The question proposed by your Lordships for the opinion of the Judges is as follows:

“ The declaration in an action on the case against the corporation states, that before the committing of the grievances by the said defendants, the King, by his letters-patent duly sealed, did give, grant, and confirm to the corporation
 * 347 and their successors the * borough or town of Lyme Regis; also all that the building called the pierquay or cob of Lyme Regis, with the liberties, franchises, privileges, and immunities to the same town, pierquay or cob, in anywise belonging, to the only proper use and behoof of the corporation, in fee farm for ever, yielding of fee farm to the King as in the letters-patent mentioned; and that the King thereby released to the corporation part of an ancient farm of a sum of money due from them annually, willing that the corporation should be thereof acquitted, and that the corporation and their successors all and singular of the buildings, banks, sea-shores, and all other mounds and ditches within the said borough, or to the said borough in anywise belonging or appertaining, or situate between the said borough and the sea, and also the said building called the pierquay or the cob, at their own costs and expenses thenceforth from time to time for ever should well and sufficiently repair, maintain, and support, as often as it should be necessary or expedient. That the King also by the same charter granted fines and amercements before the clerk of the market, without account; and a license to dig stones within the borough and parish of the town, out of the sea and on the sea-shore, for the reparation and amendment of the port, and the said pierquay or cob, and other necessary reparations and common works of the same town and borough, and belonging and appertaining to the buildings aforesaid. The declaration then avers that the charter was duly accepted, and from thence hath been and still is a governing charter of the borough, and that the corporation from the time of that acceptance hitherto have had,

held, received, and enjoyed all the benefits, profits, and advantages granted to them by the said letters-patent. It then proceeds to state that * the plaintiff was, at * 348 the time of the committing of the grievances, lawfully possessed of a messuage and land in the county aforesaid, to wit, in the said borough, which were before and at those times abutting on or near the sea-shore. That a building, bank, and sea-shore within the borough, a building, bank, or sea-shore belonging and appertaining to the borough, and a building, bank, or sea-shore situate between the said borough and sea, all which were there at the time of the sealing and acceptance of the letters-patent, and at the time of the committing of the grievances, and at the last-mentioned time, were near to, and constituted and formed, and were a protection and safeguard, and still of right ought to be so, to the plaintiff's messuage and land aforesaid, and then hindered the sea from flowing upon and over that messuage and land ; and which buildings, bank, sea-shores, and mounds, the defendants were at those times, by virtue of the said letters-patent and acceptance, liable to repair at their own proper costs and charges, as often as it might be necessary and expedient to do so.

“ A breach is then assigned, that the corporation wrongfully permitted the said buildings, banks, sea-shores, and mounds to be out of repair, for want of due, proper, and necessary repairing of the same ; by means of which the plaintiff's house and land was inundated and injured.

“ After a verdict upon a plea of not guilty, is this declaration good, and does it disclose a sufficient cause of action by the plaintiff against the corporation ? ”

In order to make this declaration good, it must appear, first, that the corporation are under a legal obligation to repair the place in question ; secondly, that such obligation is matter of so general and public * concern that an * 349 indictment would lie against the corporation for non-repair ; thirdly, that the place in question is out of repair ; and lastly, that the plaintiff has sustained some peculiar

damage beyond the rest of the King's subjects by such want of repair.¹

The third and last requisites are admitted to be averred in this declaration, and with sufficient words, at least after verdict. The doubt in the case arises upon the first and second requisites. With regard to the first, it is argued that the corporation have not by the acceptance of the charter stated in the declaration incurred any legal obligation whatever as to the repair of the place in question; that the charter does not contain a grant on condition that the corporation shall repair, but merely an expression of the King's will that they shall repair.

Looking at the words of the charter, as stated in this declaration, we are of opinion that it does cast upon the corporation an obligation to repair; which they, by accepting the charter, have adopted. The King grants and confirms to the corporation the town or borough and pier, with the liberties, franchises, and privileges, and immunities to the same belonging, in fee farm for ever, yielding of fee farm to the King as therein mentioned; and the King remits part of an ancient rent, willing that the corporation should be thereof acquitted; and then the charter goes on in these words: "And that the corporation and their successors, all and singular of the buildings, banks, sea-shores, and all other mounds and ditches within the said borough, or to the said borough in anywise belonging or appertaining, or situate between the said borough and the sea, and also the said building called the pierquay or the cob, at their own proper costs and expenses thenceforth from time to time for ever *should well and sufficiently repair, maintain, and support as often as it should be necessary or expedient."

¹ The rule here stated is generally well supported by the cases. See *Hartshorn v. South Reading*, 3 Allen, 501; *Willard v. Cambridge*, 3 Allen, 574; *Quincy Canal v. Newcomb*, 7 Met. 276; *Brainard v. Connecticut River Railroad*, 7 Cush. 510, 511; *Brightman v. Fairhaven*, 7 Gray, 271; *Smith v. Boston*, 7 Cush. 255; *Harvard College v. Stearns*, 15 Gray, 1; *Stetson v. Faxon*, 19 Pick. 147; *Thayer v. Boston*, 19 Pick. 511, 514; *Fall River Iron Works v. Old Colony, &c., R.R. Co.*, 5 Allen, 221. The rule was stated with some limitations and qualifications in *Wesson v. Washburn Iron Co.*, 18 Allen, 95.

Now these words are undoubtedly an expression of the King's will that the corporation should repair; but they are not the less a condition on that account; on the contrary, they show the consideration for the grant, the motive inducing the King to make the grant, and consequently the terms and conditions on which the grant was to be accepted. What effect such words might have in a grant from one subject to another it is not necessary to determine; such a grant between subjects is a matter of contract and bargain, strictly so speaking; but a grant from the King to a subject is a matter of favour, and the language used will be found to vary accordingly. Independently of authorities we should have come to this conclusion, but the case of *Sir John Brett v. Cumberland* (a) seems to us to be decisive of the question. That was an action of covenant by the assignee of King James I. against the executors of the lessee of a mill under letters-patent of Queen Elizabeth, sealed with her seal only, and containing these words: "Et prædictus Willielmus, executores et assignati sui, prædictum molendinum et domus et ædificia inde sufficienter reparabunt." The first question was, whether these words in the letters-patent to which the Queen's seal only was affixed, shall enure as a covenant to bind the lessee and his assigns; and it was resolved "that it should, for the lessee takes thereby, because it is a matter of record; although in show they be the words of the lessor only, yet he accepting thereof and enjoying it, it is as well his covenant in fact and shall bind him as strongly as if it had been * a covenant by indenture." So in the charter in ques- * 351 tion, the words are in show the words of the King only, but the corporation having accepted the charter and enjoyed the benefits of it, as is averred in the declaration, they are as strongly bound as if they had covenanted expressly by an indenture.

The second requisite is, in truth, that upon which this case wholly turns; viz., that the obligation must be matter of so general and public concern that an indictment will lie for the breach of it. Now this depends principally upon the construction which ought to be put upon the words of the char-

(a) Cro. Jac. 521.

ter. They are undoubtedly of a very general nature,—
 “All and singular the buildings, banks, sea-shores, and all other mounds and ditches within the said borough, or to the said borough belonging, or situate between the said borough and the sea.” It is asked, do these words embrace every little ditch or bank within the limits of the borough, whether public or private; and if not, where is the limit? The answer is, that they embrace only such buildings, banks, sea-shores, mounds, and ditches within or belonging to the borough, or situate between the borough and the sea, as form part of the defences and safeguards of the borough against the encroachments of the sea. This may be gathered from the context, from the word “sea-shores,” from the expression “situate between the borough and the sea,” and from the obvious intention and scope of the charter, as stated in the declaration. It seems to us that such construction and limitation of the words is necessary in order to give this part of the charter any meaning, and that no violence is done either to the grammatical or reasonable sense of the words by such construction.

If so, the next question which arises is, whether
 * 352 * the keeping up the sea defences of a town or borough is a matter of general and public concern. It is said that the repair of a highway or a bridge is matter of public concern, because all the King’s subjects may have occasion to use it. And why may not all the King’s subjects have occasion to reside in, or to pass through, the borough of Lyme? It may be difficult to define precisely over what quantity of land, or to how large a district, any benefit must be extended in order to render such benefit a matter of general and public concern; but surely no danger or inconvenience can arise from holding that it is sufficient if such benefit extended to a whole town or borough.

But it is said that, even if the repair of the sea defences of a town or borough be matter of general and public concern, yet that the declaration in this case does not show that the particular “buildings, banks, sea-shores, mounds, or ditches,” alleged to be out of repair, are part of the sea defences of the borough, nor is it expressly averred that the public had any

interest in them. The answer is, that the buildings, banks, sea-shores, mounds, or ditches in question, are described in the declaration in the very words used in the charter, as set out in the declaration, and are expressly averred to have been in existence at the time when the charter was granted and accepted; and it is also expressly averred that the corporation were liable under the charter to repair them. Now these words in the averments of the declaration must be understood in the same sense as the same words in the charter; and as we are of opinion that the true construction of them in the charter is to understand them as limited to the sea defences of the borough, so we think they are to be taken to have the same meaning in the declaration, *and to have the same effect as if the buildings, * 358 banks, sea-shores, mounds, or ditches in question, were expressly averred to be part of the defences and safeguards of the borough and town against the encroachments of the sea. And this opinion is further strengthened by the circumstance that the present objection arises after verdict. The effect of a verdict in curing defects in the pleadings at common-law is stated correctly in one of the last cases on the subject, viz., that of *Jackson v. Pesked*. (a) There Lord ELLENBOROUGH said: "Where a matter is so essentially necessary to be proved, that had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms in a declaration, provided that it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by verdict; and where a general allegation must, in fair construction, so far require to be restricted, that no Judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed, after verdict, that it was so restrained at the trial; but unless the allegation is of such a nature that it would have been doing violence to the terms, as applied to the subject-matter, to have treated it as unrestrained, we are not aware of any authority which will warrant us in presuming that it was considered as restrained merely because, in the extreme latitude of the terms, such a

(a) 1 M. & Sel. 234.

sense might be affixed to them." Here we think that the allegations of the declaration, as applied to the subject-matter, do by reasonable intendment show that the buildings, banks, mounds, and ditches in question were part of the defences and safeguards of the town and borough

* 354 against the encroachments of * the sea, and particularly of that part of the town and borough in which the plaintiff's property is situated. The declaration, therefore, shows a charter casting an obligation on the corporation to do repairs of general and public concern, and avers that they have omitted to do such repairs, and that the plaintiff has thereby sustained special damage. It is not, indeed, shown that the plaintiff's house existed at the time when the charter was granted; neither can this be necessary; for if the obligation to repair be of a public nature concerning the whole borough, the whole borough has a right to be protected, and it is immaterial whether the inundation affects the lands, or houses at any time erected on those lands.

It is, however, further urged, that whatever engagement the corporation may be under as between them and the Crown, so as to render them liable either to forfeiture of their charter, or any other proceeding by the Crown, yet that no stranger can take advantage of such engagement and maintain an action. It is admitted that if their liability arose by prescription, they would be indictable, and also an action would lie for special damage, as in *The Mayor, &c., of Lynn v. Turner*, (a) *Churchman v. Tunstal*, (b) *Paine v. Part-ridge*, (c) and many other authorities, which it is unnecessary to cite, because it is clear and undoubted law that, wherever an indictment lies for non-repair, an action on the case will lie at the suit of a party sustaining any peculiar damage.¹ Now, we are unable to see any sound distinction between a liability by prescription, and a liability arising within time of memory, but legally created. We do not say that prescrip-

(a) Cowp. 86.

(b) Show. 255; Carth. 199.

(c) Hardr. 162.

¹ But see, as to *quasi* corporations, created by the legislature for purposes of public policy, *Mower v. Leicester*, 9 Mass. 250; *ante*, 331 and cases in note.

tion necessarily implies a charter or grant, but it necessarily implies some legal origin, * and charter would be * 355 a legal origin. Suppose that a prescriptive obligation were alleged, and that a charter granted before time of memory were produced, and so the legal origin were shown, would that destroy the prescription? Certainly not. Would the obligation arising from that charter have been less binding within a few years after it was granted, than it is now, after a great lapse of time? Certainly not. If, then, the origin be legal, how can it be important when it took place? We do not go the length of saying that a stranger can take advantage of an agreement between A. and B., nor even of a charter granted by the King, where no matter of general and public concern is involved; but where that is the case, and the King, for the benefit of the public, has made a certain grant, imposing certain public duties, and that grant has been accepted, we are of opinion that the public may enforce the performance of those duties by indictment, and individuals peculiarly injured, by action. If it were otherwise, many inconveniences would follow; and among them, in the case in question, is this: that as the duty and the right to repair the sea defences of the town and borough are cast upon the corporation, no other person would be justified in interfering and doing repairs, however necessary; or, at all events, not until the corporation had been called upon, and neglected to do them; *The Earl of Lonsdale v. Nelson*; (a) and it is doubtful whether he would be justified even then, the proper remedy being, as there stated, by indictment or action; for nuisances of omission cannot in general be abated.

Two of the Judges have entertained considerable doubts whether the declaration contains sufficient words in * this case to show that the mounds or banks were of * 356 such public benefit as that an indictment would lie for not repairing them: but agreeing in the general view of the law, they, as well as the rest of the Judges who heard the argument, are of opinion that the question proposed by your Lordships must be answered in the affirmative, and that the declaration is sufficient.

(a) 2 B. & C. 302; S. C., 3 Dowl. & R. 566.

The Lord Chancellor said, after the unanimous judgment of the Court of Common Pleas, and the concurring judgment of three of the Judges in the Court of King's Bench upon the writ of error brought there, the fourth Judge giving no opinion, it was matter of satisfaction to him that all the Judges now agreed in the opinion which their Lordships heard now delivered. Two of the learned Judges entertained some doubt upon the pleadings, in respect to a point which did not affect the main question. He should move that the judgment of the Court below be affirmed; but although the two Courts below concurred in the judgment, yet it was not a case in which costs ought to be charged against the plaintiffs in error, as there was some doubt, and the question was one of difficulty.

Lord WYNFORD concurred in these observations.

The judgment of the Court below was affirmed, without costs.

* 357

* APPEAL

FROM THE COURT OF CHANCERY IN IRELAND.

ATTORNEY-GENERAL -v. HUNGERFORD & OTHERS.-

1834.

HIS MAJESTY'S ATTORNEY-GENERAL of IRELAND, at the Relation of WILLIAM CHARLES QUINN, Esq., Secretary to the Commissioners of Education in Ireland } *Appellant.*

THOMAS WILLIAM HUNGERFORD and Others } *Respondents.*¹

If the trustees of a charity estate make a lease upon terms, which, at the time of making it, appear to them *bond fide* to be the best that can

¹ S. C., 8 Bligh N. S. 437.

be got, a subsequent alteration of circumstances shall not affect such lease.

In such a case the question of provident or improvident management is entitled to peculiar consideration.¹ The length of time during which the property has been occupied under the lease, is also to be taken into consideration.²

ON the 26th of March, 1703, an indenture of that date was made between certain persons therein described as surviving trustees, nominated and appointed for putting in execution the powers and authorities of an Act of Parliament, made in England, in the 11th and 12th years of King William the Third, intituled, "An Act for granting an Aid to his Majesty, by sale of the forfeited and other Estates and Interests in Ireland, and by a Land Tax in England, for the several purposes therein mentioned," of the one part; and Alan Brodrick, Esq., her Majesty's then Solicitor-General in Ireland, and Lawrence Clayton, of Moyallow, * in * 358 the county of Cork, Esq., of the other part; whereby, after reciting that the Right Honourable Elizabeth Countess of Orkney, before her marriage with the Earl of Orkney, by indentures of lease and release, dated respectively the 22d and 23d of November, 1695 (the release being made between the said Countess by her then name of Elizabeth Villiers, of the city of Westminster, spinster, of the first part; the said Earl, by his then name of Lord George Hamilton, of the second part; and Lord Viscount Villiers and Thomas Brodrick, of the third part), did convey to the said Lord Viscount Villiers and Thomas Brodrick, and their heirs, all and every the honors, castles, manors, lordships, liberties, rectories, towns, lands, tenements, and hereditaments whatsoever, of her the said Elizabeth Villiers, in the kingdom of Ireland, with the appurtenances, to the use of the said Lord Viscount Villiers and Thomas Brodrick, and their heirs; but upon the trusts declared and agreed in and by an indenture bearing even date with the said indenture of release, and made between the same parties: And after further reciting, that by an indenture, bearing even date with the same inden-

¹ See *post*, 376, note 1.

² See *College of St. Mary Magdalen v. Attorney-General*, 6 H. L. Cas. 180.

ture of release, and referred to by it, it was declared and agreed by and between the parties to the same, as to the several lands, &c., therein mentioned, that the trust and meaning of the said indenture of release was, that Lord Villiers and Thomas Brodrick, and the survivor of them, and the heirs and assigns of such survivor, should from time to time make and execute such conveyances of all or any parts and parcels thereof, to and for the benefit of such person or persons, and for such estate and estates, &c., as the said

Elizabeth Villiers from time to time, whether under
 * 359 coverture or sole, by any writing, &c., should * direct and appoint : And after further reciting, that by indentures of lease and release, bearing date respectively the 22d and 23d days of October, 1696, the release being made

between the said George Earl of Orkney, of the first part; the said Elizabeth Countess of Orkney, of the second part; the said Edward Lord Viscount Villiers and Thomas Brodrick, of the third part; and the said Alan Brodrick and Lawrence Clayton, of the fourth part (reciting that the said Countess was purposed and resolved to erect and found a school-house, with all suitable conveniences, at or in the town of Middleton, in the barony of Imokilly, and county of Cork, and to establish a free school there, and to endow the same with a perpetual maintenance for the good instruction and education of youth, with exhibitions to be allowed to certain persons in the University, who should have had their education at the said school in the manner therein mentioned; and that the said Countess had determined that the several towns, lands, tenements, and hereditaments, in the said indenture of release after-mentioned, and intended thereby to be conveyed, and the rents, issues, and profits thereof, should be settled and applied to the good and charitable uses and purposes therein mentioned; and that in the first place, the rents, issues, and profits thereof should immediately go and be applied towards the purchasing and preparing a fitting and convenient place, and materials necessary for the placing, erecting, and building of a school-house, and other fitting houses, outhouses, and conveniences for a master, usher, reception for boarders, and such other buildings, and for and

towards the placing, erecting, and building the same in such part of the said town of Middleton, and after such manner and form, as she the said Countess, or * such * 360 other persons or person whom she had deputed or should depute for that purpose, should order and direct): The said Countess of Orkney, for the attainment of the good, charitable, and useful purpose aforesaid, with the consent of the said Earl, did direct, that Lord Villiers and Thomas Brodrick, and the survivor of them, and the heirs and assigns of such survivor, should grant, &c., unto the said Alan Brodrick and Lawrence Clayton, and their heirs, the lands, &c., therein mentioned, formerly leased to Sir John Meade, Knt., by the late King James the Second, when Duke of York, or his agents or commissioners, at the rent of 100*l.* per annum; and the lands also therein mentioned, formerly let unto W. Worth, Esq., by the late King James the Second, when he was Duke of York, or by his agents or commissioners, at and under the yearly rent of 104*l.*: To hold to the said Alan Brodrick and Lawrence Clayton, their heirs and assigns for ever; upon trust that they, their heirs, &c., should from time to time for ever, employ, dispose, and bestow the rents, issues, and profits arising from the same premises, towards the purchasing and finding a convenient place, materials, and necessities for the erecting and building, and towards the erecting and building of a school, school-house, and other fitting outhouses and conveniences for a master, usher, reception of boarders and scholars, and such other suitable accommodations and buildings within the said town of Middleton, and in such manner and form as should from time to time be ordered and directed by the said countess, or by such person or persons as should be deputed or nominated by the said countess for that purpose; and after the said school and school-house, and other buildings and accommodations, had been erected and finished as aforesaid, and the * charges thereof fully satisfied and discharged, * 361 then for and towards the payment and discharge of the respective allowances, salaries, and pensions thereinbefore mentioned, until such time as the same should respectively be lawfully and according to the true intent and meaning of

the said last-recited indenture of release, altered or changed; and from and after such alteration, towards the payment and discharge of such new and other allowances, salaries, pensions, and payments as should from time to time be substituted in the place of such payments wherein such alterations should be made as aforesaid. And the countess did thereby further direct and appoint, that certain persons therein named should be governors of the said school, and of the revenue above mentioned; and she invested them with the necessary powers for the management of the same. And the said countess did thereby declare, consent, and agree, that the said conveyance so made or to be made unto the said Alan Brodrick and Lawrence Clayton, and their heirs, to the purpose and for the trusts aforesaid, or the said trust, should not nor were to be liable to any revocation, or contrrollable in the whole or any part thereof, by her the said countess, her heirs or assigns, or by any person or persons claiming by, from, or under her. And the Earl of Orkney ratified and confirmed the said countess's grants; and the title of the trustees being afterwards confirmed by Act of Parliament, they accepted these trusts, and entered into possession of the estates, and made leases thereof for lives, with covenants for renewal.

In 1710, Alan Brodrick and Lawrence Clayton proposed to demise certain parts of the trust estate to Francis Daunt, for lives, with covenant for perpetual renewal, provided
 * 362 Daunt would pay a fine for * such lease, and a renewal fine on the falling in of each life; to which proposal Daunt agreed, and consented to accept of certain parts of the said lands described as having been formerly leased to Sir John Meade, Knt., at 100*l.* per annum, and to pay the like annual rent for the part to be demised as the said Sir John Meade, Knt., had paid for the whole, together with a fine to the amount of three years' rent, and a renewal fine on the falling in of each life equal in amount to a quarter of a year's rent.

An indenture of demise, dated 19th October, 1710, was accordingly made, by which A. Brodrick and L. Clayton, in consideration of a fine of 300*l.*, demised to Daunt the said part of the estates for three lives, at the yearly rent of 100*l.*

F. Daunt covenanted to pay the rent, &c., and there were the usual remedies of distress and entry. A. Brodrick and L. Clayton covenanted with F. Daunt, that on the death of any life, they, their heirs and assigns, would make to the tenants in possession proper deeds for continuing the said lease, upon the payment of a fine of 25*l.* for every new life: and F. Daunt covenanted, that within twelve months after the death of any life, he would apply to have a new life added, and pay the fine for renewal. And it was further provided, that if no such application was made, and no fine paid, the said F. Daunt should forfeit 5*s.* for every month after the twelve months aforesaid; and that A. Brodrick and L. Clayton might enter and distrain for the forfeiture. Covenant for titles by A. Brodrick and L. Clayton. This demise was duly registered in 1712. F. Daunt entered into possession, and expended considerable sums in improving the estate; and he and his tenants have remained in possession, and duly paid the proper fines, till within the last twelve years. * The * 363 widow of Francis Daunt was entitled to the lease on his decease; and two of the lives having died, she tendered proper fines for renewal.

There being disputes at the time between the co-heirs and the then governors of the charity, as to whether the co-heirs were entitled to the renewal fines, or whether the same should go to the benefit of the said school, the co-heirs refused to grant a renewal of the said lease; whereupon Mary Daunt presented a petition on the Equity side of the Court of Exchequer, in Ireland, against the co-heirs, for the purpose of enforcing performance of the said covenant for renewal; which was dismissed, upon the ground that the proper mode of proceeding for that purpose was by bill, and not by petition. The co-heirs afterwards agreed to grant such renewal, but before execution one of them died. Afterwards, W. Fuller became entitled to the said lease, and he paid the fines for renewal, which were duly receipted. In 1755 the suit of Mary Daunt was revived by W. Fuller, who presented a memorial to the governors of the charity, who recommended to the co-heirs to comply with his demand. In consequence of this recommendation, a renewal of the lease

was granted to W. Fuller, for the lives of George Daunt, W. Fuller, and Thomas Bowes Austen. W. Fuller died; the fine was duly paid, and the lease renewed for the additional life of W. Fuller Daunt. T. Bowes Austen died; and George Daunt and William Fuller Daunt paid the renewal fine, and obtained an indenture of renewal, dated 13th June, 1782, to hold for the lives of the said George Daunt, William Fuller Daunt, and for the additional life of his late Majesty George IV., then Prince of Wales.

* 364 * On the 5th of May, 1814, George Daunt died.

On the 28th May, 1814, W. F. Daunt died; and the lease having devolved on Joanna Hungerford, who died in January, 1817, the whole interest became vested in the respondent.

The reserved rent was duly paid till 1814, when the commissioners of education disputed the said lease. Thomas Hungerford, in right of his wife Joanna, applied for a renewal upon the deaths of G. and W. F. Daunt, and by order of the governors paid the renewal fine into the mercantile house of Morris, Leycester, and Call; he also caused a deed of renewal to be prepared, and tendered the same for approval.

On the death of Joanna Hungerford, her husband Thomas Hungerford, as the guardian of the respondent, wished to pay the reserved rent, but a prohibition from the said commissioners prevented him. This was in 1817. In 1821 he received the following letter from the master of the said school:—

“Middleton, July 20th, 1821.

“Sir: As it is not the intention of the Lords Commissioners of Education to disturb the leases by which you, as guardian of the minor of the late William Daunt, Esq., hold the lands belonging to Middleton school, you are requested forthwith to pay to me the rents and arrears of rents due thereon, up to the 1st May last. May I request, therefore, to know when and where it will be your convenience to pay me the same, and you will oblige your obedient servant,

“RICHARD GRIER.”

The solicitor for the commissioners then directed the reserved rent to be paid into the Bank of Ireland, where it was accordingly paid.

The rent has since been either paid to the master of the school, or into the bank.

* On the 16th April, 1828, an information was * 365 exhibited by the appellant against respondent and others, setting forth the lease of 19th October, 1710; and alleging the same was at under-value, and that the same, and also the lease of 13th June, 1782, had been made in violation of the trusts of the charity; and alleging that the said school and charitable establishments must remain entirely useless, if the said leases should be allowed to stand and be perpetually renewed. The information prayed, that the lease of 19th October, 1710, and also the renewal of 13th June, 1782, might be set aside, and decreed fraudulent and void, and in violation of the trusts reposed in the persons who made the same, and be ordered to be delivered up to be cancelled; and that an account might be taken of the rents, issues, and profits of the said lands, from such period as it should appear that the rents thereof had been received; and that, if necessary, new and additional governors might be appointed, according to the provisions of the said deed of 1696, and the trusts thereof carried into full and complete execution: and that the said lands might be set again for proper terms of years, at a full and fair value; and that the rents in arrear, and the rents to be received in future on the new letting, might be applied first in setting the said school in repair, and afterwards to keep it in good repair, and to the other purposes mentioned in the said deed of 1696; and that pending the cause, a receiver should be appointed to receive the rents, issues, and profits of the said lands; and that, if necessary, it might be referred to one of the Masters of the said Court, to approve of a proper scheme for the management of the said school, and the application of the said rents, issues, and profits. And that the informant might * have * 366 such further and other relief as the nature of his case might require, and should be agreeable to equity and good conscience.

The cause was set down for hearing by the appellant, without having made any of the persons holding by lease under the respondent parties to the cause, and also without making the representatives of Samuel Daunt, who was entitled to a perpetual rent-charge of 85*l.* out of the said lands, parties.

The cause was heard before the Lord Chancellor of Ireland, on the 19th and 20th December, 1831; and on the 30th January, 1832, his Lordship decreed, that as between the appellant and respondent, the said information, and all and every the matters and things therein contained, should be dismissed without costs; and that as to the defendants, the governors and trustees of the said school, the said defendants, the governors and trustees of the said school, should have their costs of the said suit against the appellant or relator.

Sir Edward Sugden, for the appellant:—The powers vested in the trustees must be viewed with reference to the object for which they were created. Lands vested in trustees, for the support of a school or any other charitable establishment, cannot be disposed of in this manner, without defeating the purpose for which the trust was created. Such a disposition of them is, therefore, a breach of trust. In the present instance, instead of these lands ever being capable of being made the subject of leasing, at an improved rent, the trustees have by one act rendered the rent fixed and unvarying for ever. The covenant here is for the perpetual renewal of the lease at the same rent which the trustees were enabled
 *367 to obtain * for the lands in 1710, and the renewal is to take place, not on the payment of a considerable fine, varying with the increased value of the property, but on payment of a fine, small in itself, and fixed like the amount of the rent. The trustees have bound themselves, their heirs and assigns, by a covenant to grant a perpetual renewal of the lease on these terms. Such a lease is void in equity, and the covenant, and all renewals granted under it, are also void. The general principle on which the appellants rely is distinctly stated in the judgment of Lord ELDON, in *The Attorney-General v. Brooke*, (a) where his Lordship, on
 (a) 18 Ves. 326.

reviewing a former judgment in the case of *The Attorney-General v. Owen*, repeated, as his judicial opinion, the proposition he had previously stated; and went on to say, in express terms: "It is impossible here to contend, that trustees for a charity can make a lease with covenants for perpetual renewal. Lord THURLOW frequently said, that that contract should never have been performed between man and man; but that trustees of a charity can part with the estate for ever, for a consideration not shown to be equivalent to the inheritance, is a proposition not to be endured here." The principle, and the specific instance here put, are alike fatal to the validity of the lease in the present case. The trustees have no power to make a lease, with covenants for perpetual renewal; but even if such a power could, under any circumstances, be permitted them, the consideration which could alone be sufficient to justify it, would be one that was equivalent to the value of the inheritance. There is no such consideration in the present case: here there is a parting with the inheritance without a sufficient consideration, and the charity is for ever debarred of *the possibility of * 368 obtaining any increase in the value of the land. The authority that will probably be relied on to support the judgment in this case, is the opinion expressed by the Master of the Rolls, in *The Attorney-General v. Warren*, (a) where he says, "There is no positive law which says, that in no instance shall there be an absolute alienation. An alienation, not improvident, but beneficial to the charity, and conformable to the rule which ought to guide the trustees, may be good." With respect to that case, it may in the first place be observed, that this opinion of the Master of the Rolls was not required by the circumstances of the case, the decision of which rested on other and perfectly satisfactory grounds; and in the next place, that the cases referred to in support of that opinion disclose circumstances which made it undoubted that the interests of the charities in those cases could only be served by this alienation; circumstances which, in one instance at least, amounted almost to an absolute necessity to alienate. Here no such necessity is shown to exist, and the

(a) 2 Swanst. 302.

transaction indeed, so far as the taking of fines is concerned, is contrary to the express provisions contained in the conveyances of 1696 and 1703. The deed of 1696 gives the trustees the power of applying the "rents, issues, and profits" of the estate to the purpose of purchasing and preparing a fit and convenient place, and materials necessary for erecting a school-house; but it gives the trustees no power to raise money for such a purpose by fines upon leases, renewable for ever, upon terms such as these. If the trustees have this power, so as to be able to make a lease with a perpetual covenant of renewal on the payment of a fixed fine and a * 369 fixed * rent, they would have a power to alienate in any other manner, and thus the object of the charity might be at once defeated.

Mr. Knight and Mr. Walpole, for the respondent. — This covenant is valid, and can be supported in equity. In *The Attorney-General v. Backhouse*, (a) a lease of charity estates, alleged to be fraudulent, was absolutely supported as to the interest of a sub-lessee; and as to the original lease, the Court granted an inquiry to ascertain whether the circumstances were such as to constitute fraud; and the Lord Chancellor, in directing the inquiry, said, that the question whether the lease was fraudulent or not, must depend on the degree of the unreasonableness in the circumstances, and that it must appear to be unreasonable to a high degree for the Court to infer that it was fraudulent. That case shows, that the length of the term in a lease of charity estates is not of itself sufficient to justify the interference of a Court of Equity. The same principle was in effect recognized in *The Attorney-General v. Owen*, (b) where a lease for an unusually long term, with common husbandry covenants, was set aside; and in *The Attorney-General v. Green*, (c) where a building lease for 999 years was held bad, because it was in effect parting with the property. All these cases show that, before the leases can be set aside, the Court must be satisfied that there is fraud in the grant. Even the case of *The Attorney-General v. Brooke* (d)

(a) 17 Ves. 283, 294.

(b) 10 Ves. 555.

(c) 6 Ves. 452.

(d) 18 Ves. 319.

shows, that the question of supporting or setting aside a lease of charity property depends on the circumstances under which it was granted. The judgment there contains, in its * language, qualifications of the general proposition: * 370 the Lord Chancellor says, (a) "It is incumbent on a lessee, taking a term of long duration, to show a consideration making that a proper lease." This brings the question, therefore, to the single point, whether the circumstances of the present case do not afford a sufficient justification to the trustees for what they have done. The first object of the trust was to purchase a place and materials for the building of a school-house. It was impossible to attain that object solely by employing the ordinary rents and profits of the estate, without waiting for a period of some few years during which they might accumulate. Instead of waiting for this length of time, the trustees raised a sum of money at once; the alleged breach of the trust, therefore, is, that the trustees began to effect the purposes of the trust too soon. In *The Attorney-General v. Cross*, (b) where a lease for a long term of years had been granted, the Master of the Rolls, proceeding on the custom of the country, upheld the lease, and said, "I am not aware of any principle or authority on which it can be held that such a lease is, on the face of it, an abuse of the trust." In *Ex parte Skinner*, in the matter of the Lawford Charity, (c) it was held that the tenant of a charity estate, provided he has acted fairly, is not to be turned out of possession, or to have his lease set aside, merely on the ground of inadequacy of rent to the value of his estate. In *The Attorney-General v. Price*, (d) Lord HARDWICKE, in a case of this kind, directed an inquiry whether the leases granted were or were not such as ought to have been made; and said, (e) "I will leave it to the Master to inquire whether letting on * improved rent, or leasing upon fines, be for the bene- * 371 fit of the charity, since a great deal depends upon the custom of the country." This was the principle that was afterwards adopted by the Master of the Rolls, in *The Attor-*

(a) 18 Ves. 326.

(b) 3 Mer. 524.

(c) 2 Mer. 453.

(d) 3 Atk. 108.

(e) 3 Atk. 108.

ney-General v. Cross; and both these cases proceeded upon the rule, that the circumstances under which the lease was granted, and not the mere length of the term or the amount of the rent, must be held to decide whether the lease was good or not. In the present case, the situation of the trustees, the necessity of carrying into effect the object of the trust, and the want of means to do so, compelled the trustees to grant this lease; and these circumstances justify them in having granted it. No breach of the trust has been committed, and this lease must be supported.

Sir E. Sugden, in reply. — It is not proved in this case that the money alleged to be the consideration for this lease was ever really advanced to the charity. It is true that there are cases of perpetual renewals in this country, but they are in evasion of the law; and the first example of them was set by the Roman Catholics, who had recourse to these perpetual renewals to avoid the consequences of the law against their holding freehold property. Such dispositions of property really amount to a sale, and the disposition of the property in the present instance must be taken to be a sale; and as the trustees had no right whatever to sell the property, this disposition of it must be treated as invalid, and set aside. The inheritance has been parted with, and there is no security for the rent; and if the disposition of the property amounts, as we say it does, to a sale, then we contend that, in the * 372 first place, the trustees had no authority to sell, * and in the next, that there was no consideration given sufficient to be the purchase-money of the property.

THE LORD CHANCELLOR. — This is a case of first impression, and therefore I should like to take time to consider it. In England, such a lease would not stand for twenty-four hours; it may, however, be different in Ireland. I must see the grounds on which the Chancellor of Ireland decided.

August 18.

LORD CHANCELLOR. — My Lords, in the judgment in *The Attorney-General v. Brazen Nose College*, I stated to your

Lordships that I should have occasion, in advising your Lordships upon this case, to mention more specifically the true effect, in contemplation of the law as administered in our Courts of Equity, of lapse of time in matters of charity; and this opportunity is afforded me on the facts of the present case. This is an appeal from a decree in the Court of Chancery in Ireland, dismissing without costs an information filed there; that information having been filed by his Majesty's Attorney-General, on the ground of the loss incurred by the charity from the grant of a very long lease, — a lease for three lives, with a covenant for perpetual renewal. Now the question which was raised by this decree is, and the question which was before the Court below was, whether such a lease is good, or void, or voidable, and, regard being had to the circumstance that the land leased is charity land, whether the lease can be sustained or must be set aside in a Court of Equity?

My Lords, I stated, at the conclusion of the argument, that it certainly had a strange aspect to my mind, accustomed to the course of proceedings of English Courts, and accustomed to the manner in * which the lands are leased, * 373 whether by lease or by fines, in this country, to find a charity lease sustained which was in fact a perpetuity. I nevertheless then said, that though this gave me an impression not so favourable as I could wish to have of the judgment of the Court below, it might be very possible for me, upon examination, to find it bottomed on the truest principles; for that in Ireland, and in that part of Ireland in which these lands lay, at the time in which this lease was granted, this might be a provident and right lease. This supposition or anticipation of mine has been amply confirmed by the examination I have given of the charity; and I am prepared to move your Lordships to affirm the judgment, upon the grounds which I shall now state.

My Lords, this was a lease granted in the year 1710; and the first point made, or attempted to be made, was to show, that it was granted at an undervalue. I am clearly of opinion that there is no foundation for this point, and that I could not take upon myself to say in the year 1834, nor could the

Court of Chancery in Ireland undertake to say in the year 1832, on the case that was then before the Lord Chancellor of that country, that this land was let at an undervalue at the time it was leased; for there was a fine taken of 300*l.*, and there was a rent reserved of 100*l.* a year, with a fine of 25*l.* upon each and every life dying, payable upon each subsequent renewal. Now, at that time the interest of money was eight per cent in Ireland; who, then, shall take upon himself to say, that if he had been dealing with the property at that time, he would have thought he gave it away, or squandered it away, or improvidently dealt with it, by leasing it at an undervalue? If he took 300*l.* money, bearing eight per cent interest, and 100*l.* for the rent, and the fines upon each renewal, I am not prepared to say that he would have been undervaluing the land; on the contrary, it appears to me that the lease was granted on an adequate value.

Then, in the next place, we come to the duration of the term, and I am not sure that it is law, founded either upon principle, on statute, or on authority, to lay down the proposition, that all leases such as this, that all perpetuities such as this, even that all alienations, if it can be said that this lease amounts to an alienation, are therefore, as such, void or voidable. There is no warrant of principle for holding that; each case must depend upon its peculiar circumstances. I put the case where even an alienation might be fit; not only justifiable, not only harmless, as regards the breach of trust, or abuse of trust, by the trustees, but might be a fit course for them to adopt. I will even put the case, which I can well conceive, where they could not do their duty to the charity if they did not alienate a part of the land; and I threw out, in the course of the argument, an observation to which I found no answer to be given, for indeed it was admitted on the other side, that supposing there was a small piece of land, a corner of land, or an outlying estate, property of the charity, and for which there could be got, as the price for the sale of it, on account of its peculiar situation, so large a sum of money as to put the charity in possession, we shall say of 1000*l.*, though the whole of the rents and profits of

that land, let in the ordinary manner, might never exceed 1l. a year, or 10s. a year, it would be perfect madness in the charity, as well as in an individual, not to obtain that sum, and sell the land for the 1000l. In all these cases much depends upon the circumstances; and the question is, whether or not there has * been a provident or an im- * 375 provident management of the charitable fund? If the management has been such as I have described, provident, then that is justifiable; nay, I go further, and state, that in the case I have supposed, the trustees would have been guilty of an abuse of trust, if they had hesitated to part with the land upon these terms; and that an information at the suit of His Majesty's Attorney-General, or of any relator, might well have maintained against them, to compel them to do that which was for the real benefit of the charity.

My Lords, that which I have stated to be the rule of provident and improvident management, has the sanction of full authority. I refer to the *Attorney-General v. Cross*, (a) where the Master of the Rolls holds that there is no authority for saying that such leases are, on the ground of the length of time alone, void, as an abuse of trust. I refer again to what Lord ELDON said (but that applies to another part of the case, that where a tenant gets at a low rent the charity lease), this of itself, without other circumstances, is not enough to authorize the Court to turn him out, because it is a charity estate. That applies to this case, because you are not only asked to make the lease void, as in favour of the lessor, but against the lessee. You are taking the land from the lessee; though Lord ELDON states that the length of the lease granted by the charity to the tenant, if the tenant is guilty of no misconduct, and if he has behaved with honesty, is no ground for turning him out. I refer also to the case of *The Attorney-General v. Warren*, (b) a case accurately reported. It is there laid down by a great Judge, I think by the late Master of the Rolls, Sir THOMAS PLUMER, that the trustees * are bound to a prudent administration * 376 of the trust, and that there is no positive law or rule of the Court which says that there shall be no long term, or

(a) 3 Meriv. 524.

(b) 2 Swanst. 302.

even that there shall be no alienation, if the alienation is for the benefit of the trust.¹

Let us come then, my Lords, a little closer to the facts of the lease ; and let us, in the first place, observe whether or not it was a provident bargain. At that time, in Ireland, the course was to let leases upon lives, with covenants for perpetual renewal ; in a word, to let leases such as this is, renewable for ever on a fine received at the time of each of the renewals, with a certain rent besides. This practice was said to have been very much adopted ; and I see the Lord Chancellor of Ireland, in a note that I am favoured with, says that the Duke of Ormond introduced this plan for the sake of

¹ Although trustees of charities could not, as a general rule, even before the restrictions recently imposed by statute in England, have made an absolute disposition of the charity estate, yet there was no positive rule that in *no* instance could an absolute disposition be made, for then the Court itself could not have authorized such an act, — a jurisdiction which, it is acknowledged, has from time to time been exercised in special cases. See *Attorney-General v. Mayor of Newark*, 1 Hare, 400; *Re Ashton Charity*, 22 Beav. 288; *Attorney-General v. Kerr*, 2 Beav. 420; *Attorney-General v. Brettingham*, 3 Beav. 91; *Attorney-General v. Pargeter*, 6 Beav. 150; *Odell v. Odell*, 10 Allen, 6; *Wells v. Heath*, 10 Gray, 17; *Shotwell v. Mott*, 2 Sandf. Ch. 55; *College of St. Mary Magdalen v. Attorney-General*, 6 H. L. Cas. 189, 205. The true principle was, that an absolute disposition was then only to be considered a breach of trust, when the proceeding was inconsistent with a provident administration of the estate for the benefit of the charity. See *Lewin Trusts* (5th Eng. ed.), 406; *Attorney-General v. Kerr*, 2 Beav. 428; *Attorney-General v. South Sea Co.*, 4 Beav. 543; *Parke's Charity*, 12 Sim. 329; *Re Suir Island Female Charity School*, 3 Jo. & Lat. 171. The transaction was strongly assumed to be improvident as against a purchaser, until he had established to the contrary. *Attorney-General v. Brettingham*, 3 Beav. 91. Now, under the provisions of recent English Acts, the Commissioners of Charities are empowered, on application made to them, to authorize the sale or exchange of any part of the charity property, and the trustees are restricted from any sale, mortgage, or charge, without the consent of the commissioners. *Lewin Trusts* (5th Eng. ed.), 406, 407. In *Odell v. Odell*, 10 Allen, 6, GRAY J. said : " If an alienation of the estate becomes essential to the beneficial administration of the charity, it may be authorized by a Court of Chancery. *Tudor on Charitable Trusts*, 298, and cases cited; *Shotwell v. Mott*, 2 Sandf. Ch. 55; *Wells v. Heath*, 10 Gray, 17." See also *Genl. Sts. Mass. c. 100, § 16*; *St. 1864, c. 168, St. 1869, c. 331*.

obtaining more solvent and better tenants, and, above all, Protestant tenants. The Duke of Ormond's example was followed by others, and it became the usual practice to grant such leases, with perpetual renewals. Now, my Lords, that being the case, what have we here but the ordinary mode of management in that country? for the reason I have mentioned, such a lease was held beneficial, and none of us can say, that if he had been alive about that period, he would have done otherwise with his own estate. The trustees of the charity were bound to do what a prudent and provident landlord with his own estate would do; and I think such a landlord, acting at that time, would have granted this lease; it is past all doubt that he would have done so. My Lords, no trustee is bound to be a prophet; he is bound to act with providence and foresight to a reasonable extent, but he is not bound to an absolute foreknowledge, which no man can have, of events that * afterwards do occur. The * 377 event has proved that it would have been more provident not to have granted such a lease, because the lease has a great deal more time to run, and it would be better if it had expired; but we are not to judge of it by the state of things now, but as they were at the time. The very word "provident," which the law uses in the decisions referred to, shows by its own proper force that you are to look forward, but not to look forward with an indefinite or with a prophetic eye, but in the way in which a reasonable man of common sagacity and prudence might do. Such a man would adapt his conduct to the facts; would look at the facts and circumstances in which he lives, and at the result likely to happen from those facts and circumstances, as far as he could easily and with reasonable certainty decide on them. The complaint of abuse must not be simply that he has not selected that mode by which the lease, if granted now, would be rendered most profitable. Events have happened, but who was to know that they would happen? Consequences have taken place, but who could tell that these would be the result of the course which has been adopted, one hundred and twenty years after the date in question? We, enlightened by those events, and having the benefit of those events, can

tell, and any child can tell very easily, what would have set at nought the knowledge of the wisest and most far-sighted individuals then living, even to have the slightest idea about them.

For these reasons, therefore, I am certainly of opinion, that regard being had to the circumstances of the times, and to the usual practice of landlords in dealing with large estates at that time in that country, that this was not such an
 * 378 improvident lease * that, even in the case of charity property, your Lordships can be satisfied of an abuse having taken place.

Then with respect to the time, to which I said I should address myself, of 120 years, during which nothing has been done; fifty-two years have passed since the last renewal; would it not be monstrous to call upon the landlord to turn out the tenant, after 300*l.*, had been paid for the fine in the first instance, after 100*l.* had been paid for the rent, after 25*l.* had been paid upon the renewal; all paid upon the faith of the bargain standing firm, and all paid upon the faith, between the tenant and the charity, that this was a valid lease perpetually renewable? It has been truly said, and repeatedly said, that time is no bar in the case of a charity;¹ and among other cases to that effect, *The Attorney-General v. Warren* is cited; but then, if the Statute of Limitations is in such a case no bar, it is at all events a circumstance which produces a very powerful obstacle, not easily got over, in the way of any Court of judicature that may set aside what has stood so long, and may have been made the subject of so many arrangements. Would they not have a right to complain? might not the tenant well say, I did not mean to give 300*l.* in those days, when that would be worth 3,000*l.* now; or, my ancestor did not mean to give 300*l.* for a lease not

¹ In *College of St. Mary Magdalen v. Attorney-General*, 6 H. L. Cas. 189, it was held that charities are trusts, and are, as such, within the operation of 3 & 4 Wm. 4, c. 27. This decision has been followed in subsequent cases. *Attorney-General v. Davey*, 4 De G. & J. 136; S. C., 19 Beav. 521; *Attorney-General v. Payne*, 27 Beav. 168; *Lewin Trusts* (5th Eng. ed.), 638; *Perry Trusts*, § 745; *Monck v. Paget*, 3 Cl. & Fin. 446, and note.

renewable for ever ; or he did not mean to give 100*l.* a year ; he was losing for the first ten or twelve years, but he thought he should repay himself by a longer renewal, and in contemplation of that he paid the fine ?

Upon the whole therefore, my Lords, I am clearly of opinion in this case, that the Court of Chancery in Ireland has come to a sound decision ; and therefore I have great satisfaction in moving your Lordships * that this decree * 379 should be affirmed ; but, for the reasons that induced his Lordship not to give costs, I move your Lordships that the costs should not be given, though I do not advise your Lordships to pay the costs out of the charity estate.

Judgment affirmed.

APPEAL

FROM THE COURT OF CHANCERY.

NOTTIDGE v. PRICHARD.

1834.

| | |
|---|----------------------|
| WILLIAM NOTTIDGE and RICHARD BLACK (Surviving Executors of Sir THOMAS MARYON WILSON, Bart.) | } <i>Appellants.</i> |
| GEORGE PRICHARD | |
| | <i>Respondent.</i> |

Partnership Debt. Dissolved Partnership.

Two solicitors in partnership had a bill of costs and disbursements against a client ; one of the partners, after the dissolution of the partnership, continued to be the solicitor of the client, and received his rents, out of which he retained the amount of the partnership debt ; and he stated that he did so on the understanding that the debtor should have credit for the sum so retained, and that he considered that debt to have been satisfied by the moneys retained ; but no account had been settled between him and the debtor, nor had he specific directions to appropriate the moneys retained to the payment of the partnership debt.

Held, that as against the other partner, the debt to the partnership was not to be considered as satisfied.¹

June 18, July 5.

THE respondent and Carter Draper, carrying on business in partnership as solicitors and attorneys, were in that character employed by Sir Thomas Maryon Wilson, Bart., by * 380 whom, in the course of *such employment, a bill of fees and disbursements to a large amount was incurred. The partnership of the respondent and Draper was dissolved in 1817, and Sir T. M. Wilson continued to employ Draper alone as his solicitor, and also as the receiver of his rents, until the month of September, 1820. In July, 1818, Draper enclosed in a letter to Sir T. M. Wilson, a bill of fees and disbursements due to the late partnership, amounting to 867*l.* 5*s.* 6*d.*, from which, as he stated in the letter, some payments on account were to be deducted. In February, 1821, the respondent served on Messrs. Stride & Lyddon, then the solicitors of Sir T. M. Wilson, a notice in writing not to pay Draper the balance of any bill of costs due from Wilson to the late firm of Prichard & Draper. By articles of agreement, dated the 22d of February, 1821, executed by and between the respondent and Draper, after reciting that, upon examination of the accounts, Draper was indebted to the respondent (besides the respondent's share of the partnership debts) in the sum of 750*l.*, for money advanced on his behalf; it was agreed that he should give the respondent his bond for that sum, payable with interest, by instalments; and that, as a further security, he should assign to the respondent all the partnership debts which then remained outstanding and due. A copy of this agreement was on the same day delivered by the respondent to the solicitors of Sir T. M. Wilson; and a few days after the respondent wrote and sent to him a letter, demanding payment of the balance of the bill of fees and disbursements, due to the late firm.

In May 1821, the respondent filed his bill in Chancery

¹ See 1 Lindley Partn. (Eng. ed. 1860) 222, 424, 431; *Wallace v. Kelsall*, 7 M. & W. 264; Collyer Partn. (5th Am. ed.) 639; *Piercy v. Fynney*, L. R. 12 Eq. 69.

against Sir T. M. Wilson and Carter Draper, stating the above facts, and charging, among * other things, in * 381 answer to pretences suggested in the bill, that Draper was not employed as the solicitor and agent of Wilson subsequent to the dissolution of the said partnership, until after Wilson had notice of the said dissolution, and that any debt incurred by Draper to Wilson in the course of that employment could not be set off against the partnership debt due to Prichard & Draper; and also that Wilson could not retain a moiety of the bill of costs due to the firm, on account of any separate demand he might have against Draper alone. The bill prayed against Sir T. M. Wilson an account of what was due and owing from him to the partnership at the time of its dissolution, and that he might not be allowed any credit or set-off therein in respect of any money received, or pretended to be received by the defendant Draper for or on account of Wilson since the dissolution of the partnership.

The answer of Carter Draper stated that the bill of fees due to himself and the respondent, from Sir T. M. Wilson, had been satisfied to him out of the moneys of Sir T. M. Wilson retained by him.

Sir T. M. Wilson died without having put in his answer. The bill was revived against his executors and personal representatives, viz., the appellants and John Stride, since deceased, who had been for some time the solicitor of Wilson. They in their answer, put in in February, 1822, stated, among other things, that they had been informed and believed, that Draper admitted that all the said bills of accounts delivered by or on the part of the respondent and himself as partners, to Sir T. M. Wilson, had been satisfied to him, Draper, out of and by moneys of Sir T. M. Wilson; that they had heard and believed that such bills and accounts were all paid and satisfied * previously to February, 1821; and submitted, * 382 that no part of the said debt alleged to be due from Sir T. M. Wilson, remained a debt still outstanding and due to the firm of Prichard & Draper; that Draper, from about Michaelmas 1818, to about Michaelmas 1820, received the rents of the estates of Sir T. M. Wilson, greatly (as they believed) exceeding the amount of any bills of fees and dis-

bursements which at the time of the dissolution of the said partnership might have remained due from Sir T. M. Wilson, and they submitted, that any sum or sums of money which was or were received by Draper subsequently to the dissolution of the partnership, could be set off or applied to satisfy the debt, if any, due from the said Sir T. M. Wilson to the said partnership firm, inasmuch as Sir T. M. Wilson, as was alleged by Draper, directed him, Draper, to satisfy the bills of fees and disbursements due from the said Sir T. M. Wilson to the late partnership out of moneys which Draper received on his account; and it was competent to Sir T. M. Wilson to direct Draper to satisfy such bills in that manner, and for Draper to receive payment and satisfaction for such bills. That inasmuch as the respondent had not, from the time of the dissolution of the said partnership up to the month of February, 1821, when the bills of the said partnership had been all paid and satisfied, ever given any notice or other kind of prohibition to Sir T. M. Wilson against settling with the said Draper, and paying or satisfying to him the amount of any bill of fees and disbursements remaining due to the respondent and Draper at the time of the dissolution of their partnership, they submitted, that the respondent must be considered to have authorized or sanctioned and allowed the making

* 383 of payments by Sir T. M. Wilson to Draper in any form or mode which he, Wilson, might think fit, on account or in respect of the said partnership demand, or any part thereof; and also submitted, that any payment to, or receipt or retainer by Draper, out of any moneys of Sir T. M. Wilson, on account or in respect of such partnership demand, was a sufficient and valid payment, or satisfaction and discharge thereof, to all intents and purposes.

The respondent filed a supplemental bill in November, 1823, stating, among other things, that, it having been alleged on the part of the defendants, that no bill of fees had been delivered to them or to their testator, duly signed, according to the statute, he, the respondent, did on the 27th of May of that year, deliver to the defendant Stride, for himself and the other executors of Sir T. M. Wilson, a bill of fees and disbursements for business done and money advanced for Wilson

by the respondent and Draper, as attorneys and partners, which bill was signed by the respondent conformably to the statute. And he prayed that he might, as against the defendants (the appellants and the said John Stride), have the benefit of the delivery of the said bill of fees. The appellants, and their co-executor Mr. Stride, who died shortly after, by their answer to the supplemental bill, admitted the delivery of this bill of fees.

The cause came on to be heard in July, 1826, before Lord GIFFORD, the then Master of the Rolls, when his Lordship was pleased to order it to be referred to the Master to tax the bill of fees and disbursements of the respondent and Carter Draper, and to take an account of what, if any thing, was due and owing from the estate of Sir T. M. Wilson, in respect of the said bill; and for the better taking of the said

* account, the parties were to be examined upon inter- * 384
rogatories, and to produce all books, papers, and writings in their custody or power, relating thereto, as the Master should direct; and the Master was to be at liberty to state any special circumstances, at the request of either party.

The Master, by his report dated 11th November, 1828, found and stated in substance that he had taxed the said bill of fees and disbursements of 867*l.* 5*s.* 6*d.*, at the sum of 768*l.* 15*s.* 8*d.* and that he had caused Carter Draper to be examined on interrogatories; and he found that Sir T. M. Wilson had paid to Draper, on account of the said bill, several sums of money, amounting together to 326*l.* 9*s.*, which, being deducted from the taxed bill, reduced the same to 442*l.* 6*s.* 8*d.*, which he found to be remaining due from Sir T. M. Wilson's estate in respect of the said bill; and the Master submitted to the Court, at the request of the appellants, the following circumstances (among others which are before stated): In and previous to the year 1814, Carter Draper was the solicitor of Sir T. M. Wilson; in that year the respondent and Draper entered into copartnership as solicitors, and continued in such copartnership until October, 1817, when the same was dissolved, and Sir T. M. Wilson was aware of the dissolution of the said copartnership shortly after the time thereof. On the 25th day of July, 1818, a joint bill of costs was delivered by Carter Draper to Sir T. M. Wilson,

amounting to 867*l.* 5*s.* 6*d.*, accompanied by a letter written by Draper (partly in these words): "At length I am able to send you my accounts, which are three in number; the first is due to Prichard & Draper, of 867*l.* 5*s.* 6*d.*, from which I believe there have been received the several

* 385 * sums of 50*l.*, 26*l.* 9*s.*, 28*l.*, and 300*l.* The second is also due to Prichard & Draper, and is the separate account of the parish of Fletching. The third account is owing to Draper & Bird" (Draper's then partner). And in a letter written by the respondent to Draper, the 27th of October, 1818, the respondent used the following expression, "Will Sir T. W. soon settle?" and it was admitted that Sir T. M. Wilson was the person alluded to by the style and initial letters, "Sir T. W." And after the said dissolution of co-partnership, Draper continued to act as solicitor and receiver of rents of estates of Sir T. M. Wilson, until after September, 1820; and on the 22d of February, 1821, Sir T. M. Wilson filed his bill of complaint in Chancery against Draper; and the appellants, as executors of Wilson, after his decease filed a bill of revivor of such suit, and it was still pending; and the respondent had examined Draper as a party in this cause, upon interrogatories; and the Master found by his examination put in thereto, that Draper stated that he did not, since the dissolution, of the said partnership between the respondent and the examinant, settle and adjust any accounts with the late defendant, Sir T. M. Wilson, nor did T. M. Wilson ever adjust with the examinant any account in which credit was given to him for any sums of money as having been paid to the examinant expressly for or on account of any bill of costs, or for moneys obtained by the examinant expressly for or on account, or in satisfaction, or part satisfaction of any bill of costs; nor did Sir T. M. Wilson, to the knowledge and belief of examinant, ever debit the examinant with any sum or sums of money expressly on account of any bill of costs. And the examinant stated that Sir T.

* 386 M. Wilson did not ever, in writing, * expressly allow to the examinant any sum or sums of money expressly in payment and satisfaction, or in part payment and satisfaction, of any account; and the examinant stated that

his accounts with Sir T. M. Wilson had not been settled. And the Master further certified that the appellants had also examined Draper as a party in this cause, upon interrogatories; and he found that Draper, by his examination thereto, stated that he did receive from Sir T. M. Wilson the whole amount of the bill of costs of the late partnership between the examinant and the respondent, due from Sir T. M. Wilson at the time of the dissolution of the said late copartnership; and the examinant stated that he received the amount thereof at various times, and by various sums of money, some of which were paid to him by Sir T. M. Wilson, and others of them by moneys retained by the examinant, by the direction or with the permission of Sir T. M. Wilson, out of moneys belonging to him which had been received by the examinant, but he did not recollect or believe that such moneys, or any part of them, were retained by him expressly on account of such bill of costs; for the examinant stated, that, when he had moneys of Sir T. M. Wilson in his hands, Sir T. M. Wilson told him to retain what he wanted, as money would be of use to him. And the examinant stated, that the bill of costs was in fact paid and settled on the 10th day of September, 1820, when the sum of 282*l.* 17*s.* 5*d.* was retained by the examinant; and he did not recollect that any thing particular passed on the occasion; but he, and Sir T. M. Wilson, as he believed, understood that credit was to be given by the examinant in his accounts with Sir T. M. Wilson, for the sums so paid and retained; and for that reason he did not give, * and was not required to give, * 387 any receipt for the moneys which were so paid to or retained by the examinant.

The cause came on for hearing upon further directions before Sir JOHN LEACH, the late Master of the Rolls, in January, 1831, when his Honor ordered the respondent's bill to be dismissed with costs. (a) From that decree the respondent appealed to the Lord Chancellor, who, upon the hearing of the cause in July, 1831, ordered the said decree to be reversed, and that the appellants should pay to the respondent the said bill of costs of 442*l.* 6*s.* 8*d.*, found by the Master's report

(a) See 1 Russ. & My. 191, and Tamlyn, 332.

to be due from the estate of Sir T. M. Wilson, together with the costs of the suit. (b)

From this last decree the appellants appealed to this House.

Mr. Pemberton and Mr. Cooper, for the appellants. — The principal question under appeal is, whether the dealings between Sir T. M. Wilson and Mr. Draper subsequent to the dissolution of the partnership of Prichard & Draper, worked a payment or satisfaction of the bill of fees due to the partnership, so as to exclude the respondent from establishing that demand now against Sir T. M. Wilson's estate. That Draper received of Wilson, or retained out of his rents, a sum exceeding the partnership debt is quite certain; the question, therefore, comes to this, whether the respondent knew that Draper was receiving rents for Wilson, and whether he authorized him to receive this debt? The inquiry made by the respondent, in his letter of the 27th of October, 1818, as set forth in the Master's report: "Will Sir T. W. soon settle?" leaves it open to be inferred, if it does not * prove conclusively, that the respondent was then aware of the connection between Sir T. Wilson and Draper, and that he had authorized him to apply for, and consequently to receive, the partnership debt.

The partnership having been dissolved in October, 1817, and the respondent not having until February, 1821, given any notice to Wilson not to pay the bill of costs to Draper, Wilson could not suppose that he was not at liberty to pay it to Draper. The agreement to assign to the respondent the debts, due to the partnership, was not made until February, 1821, when in fact all the fees and disbursements due from Wilson to the partnership had been paid and satisfied by Draper's retaining for that purpose the moneys received by him on Sir T. M. Wilson's account. The case made by the respondent is, that the bill of costs was unpaid at the date of the agreement to assign the partnership debts, and that Sir T. M. Wilson had subsequently made a colourable pay-

(b) 1 Russ. & My. 197.

ment of them in disregard of the respondent's notice to him not to pay Draper; the whole case stated by the respondent is at variance with a prior payment or satisfaction of his demand, and he does not by this suit seek to set aside such payment.

The appellants do not now question other points argued below, and decided by the Lord Chancellor; namely, the admissibility of Draper's examination as evidence in the cause, or the validity of the objection to the bill of costs, on the ground that it was not duly signed and delivered by the respondent. One of these points was in favour of the appellants, one was against them (*a*); nor do they claim to set off against the partnership debt any debt due from Draper alone to Sir T. M. Wilson: that point was raised on the pleadings * by the respondent charging it, but the * 389 appellants do not set up that defence. Their substantial defence to the respondent's demand is, that it was fully paid and satisfied to Draper before the date of the respondent's notice to Wilson not to pay Draper. The examination of Draper, which was held to be admissible (and he was the only witness that could speak to the matter,) went to show that he had, prior to the agreement in February, 1821, retained out of Sir T. M. Wilson's moneys the whole amount of the bill of costs. But the Lord Chancellor, in giving his judgment, stated as a reason for his decree now appealed from, that although Draper admitted that he had, prior to that date, retained the amount of the bill of costs out of the moneys received by him on Wilson's account, yet he did not state positively that Wilson had directed or instructed him to retain such moneys for that specific purpose. Now that is not a sufficient reason for this decree, inasmuch as no such point was raised by the respondent's bill, or ever put in issue in the suit; nor were the appellants ever called upon to show that Sir T. M. Wilson had given such directions. If such directions had been necessary to justify the retainer by Draper in satisfaction of this debt, the decree would be still erroneous, inasmuch as an inquiry ought to have been first made to ascertain whether such directions had been given. But the

(*a*) 1 Russ. & My. 198, 199, 200.

appellants submit that no particular directions were necessary. A general authority is a sufficient warrant for the payment. Sir T. M. Wilson gave a general authority to Draper to retain the money out of his rents in payment of the partnership debt; that authority is admitted and was acted upon by Draper, who swears that he retained the debt; and

* 390 payment to one partner of a partnership * debt, without fraud or collusion, entitles the debtor to be discharged.

Duff v. East India Company, (a) *Bristow & Porter v. Taylor*. (b) If there were fraud or collusion, it was for the respondent to prove it.

In the dealings between Wilson and Draper, subsequent to the dissolution of the partnership, mutual debts were incurred; Draper had to account for the rents received by him; Wilson was liable for costs and disbursements made by Draper on his behalf, as his solicitor. It is admitted by Draper that he received or retained more of Wilson's moneys than were necessary to pay the debt due to himself; that being a fact not denied by the respondent, may it not be presumed that the surplus was appropriated to the payment of the partnership debt? The law will presume more; the bill of costs due to Prichard & Draper from Wilson was an older debt than any costs incurred by him to Draper during his employment in 1820 and in 1821. A general authority being given by Wilson to Draper to retain out of the rents any demand Draper might have against him, and the question being, whether the money retained should be in discharge of the partnership debt or of the private debt, the law will presume, in the absence of evidence of any directions to the contrary, that the moneys retained were appropriated to the oldest debt. *Devaynes v. Noble*. (c)

The effect of the decree of the Court below, if allowed to stand, is to compel payment a second time out of Wilson's estate, of a debt which has been already paid to a partner of the respondent; which is contrary to the principles of equity. The circumstances of this case justify a Court of Equity in interposing to protect Wilson's estate. On the sup-

(a) 15 Ves. 198.

(b) 2 Stark. 50.

(c) 1 Meriv. 530, 603.

position that * Draper has deceived both parties, it * 391 must be held that Wilson has a stronger equity than the respondent, who ought not to take any benefit from the misconduct of his partner, who may have acted fraudulently.

With respect to costs, whatever your Lordships' judgment may be on the merits, considering that the respondent has established only little more than half the claim, — 442*l.* out of 867*l.*, — and that two learned Judges in the Court below differed as to his right even to that sum, your Lordships will not think this a case that entitles the respondent to costs.

Mr. Knight, for the respondent. — It is admitted in the pleadings and in the argument for the appellants, that Sir T. M. Wilson, their testator, incurred a debt to the firm of Prichard & Draper, and the Master has certified that 442*l.* 6*s.* 6*d.* of that debt remained due ; and whatever the amount may be, it was wholly vested in the respondent by the assignment of 1821. There is no evidence of any payment or discharge of that debt to the respondent. There is nothing in the dealings or transactions which took place between Sir T. M. Wilson and Draper subsequently to the dissolution of the partnership, which amounts to a legal or equitable payment, satisfaction, or extinguishment, of the debt due to the partnership, by way of set-off or otherwise. The defence of the appellants being reduced to a mere attempt to set off the separate debt due by Draper to the estate of Wilson, against the debt due from that estate to the partnership of Prichard & Draper, to the prejudice of Prichard, is contrary to the whole current of the decisions both at law and in equity.

The learned counsel was stopped by the Lord Chancellor.

* THE LORD CHANCELLOR. — My Lords, if any * 392 doubts had been raised in this case upon points of law, I should have wished this tribunal of appeal to be differently constituted, and to be placed upon a better footing, as I am the Judge who decided this case in the Court below, and

whose decision is now appealed from. This, therefore, can be only a rehearing. But if I found my decision was erroneous I should have no hesitation in moving your Lordships to reverse it; for I hold it that every Judge is more disposed to correct an error in his own judgments than in those of other Judges, and that it is better to correct an error when one may, than to let it go down to posterity as evidence against him. But there is no nice question of law raised before your Lordships. One point of contention in the Court of Chancery was the admissibility of Draper's examination as evidence against the plaintiff there in respect to transactions subsequent to the dissolution of the partnership between them. Before I decided that point I consulted the Lord Chief Justice of the Court of King's Bench, and that learned Judge was clearly of opinion that the examination was admissible, and I so decided. (a) The next question made in the Court below was an objection that the bill of fees and disbursements, which was the subject-matter of the suit, had not been signed and delivered conformably to the statute 2 G. 2, c. 23. I was of opinion that that objection was not cured by the fact of a bill of costs duly signed being, after the institution of the suit, delivered to the principal defendant, although it was put in issue in the cause by supplemental bill. Though I thought that a fatal defect in equity, as it is in law, yet as it was not taken advantage of at the first hearing before Lord GIFFORD, I held * that it came too late on the hearing upon further directions. (b) Then came a question of set-off, which was not urged; for it is clear, that although A. may set off a debt due from B. and C. against their joint demand, he (A.) cannot so set off against such demand money received by B. to the use of A.; which was precisely the case here, and which was a question of fact depending upon Carter Draper's evidence.

I fully assent to the two propositions of law stated at the bar: First, if there be a partnership and a dissolution of it, a debtor to the partnership may, after notice that it is dissolved, pay any one of the partners, and that partner receive-

(a) 1 Russ. & My. 199, 200.

(b) 1 Russ. & My. 198.

ing the money may well discharge the debtor.¹ That is laid down in the cases cited at the bar; *Duff v. The East India Company*, (a) and *Bristow v. Taylor*. (b) Secondly, if in the course of dealing between A. and B. various debts are from time to time incurred, and payments made by B. to A., and no acknowledgment is made by A., nor inquiry by B. how the payments are appropriated, the law will presume that the priority of debt will draw after it priority of payment and satisfaction, on the ground that the oldest debt is entitled to be first satisfied.² That doctrine is recognized in *Devaynes v. Noble*; (c) but the principle was never applied to cases where the obligations were *alio jure*, nor to other cases, as, for instance, where in dealings between B. and C., the latter directs B. to receive moneys due to him, the law will not presume an appropriation of these moneys to the payment of a debt due to A. and B. in the absence of any specific directions. Then arises the question, whether any thing passed between Sir T. M. Wilson and Carter * Draper, * 394 to authorize the latter to retain Wilson's money in payment of the partnership debt? That question can only be solved by looking at Draper's evidence, in which he says that Wilson "did not ever, in writing, expressly allow any sum or sums of money expressly in payment or satisfaction of any account," &c., and "he did not recollect or believe" (these are his words) "that such moneys, or any part of them, were retained by him expressly on account of such bill of costs; for, when he had moneys of Sir T. M. Wilson in

(a) 15 Ves. 198.

(b) 2 Stark. 50.

(c) 1 Meriv. 608.

¹ See *Morse v. Bellows*, 7 N. H. 568; *Gregg v. James*, Breesee, 107; *Yandes v. Lafavour*, 2 Blachf. 371; *Allen v. Farrington*, 2 Sneed, 526; *Brasier v. Hudson*, 9 Sim. 1; 1 *Lindley Partn.* (Eng. ed. 1860) 220, 221, 712; *Collyer Partn.* (5th Am. ed.) § 638.

² See 1 *Lindley Partn.* (Eng. ed. 1860) 840 *et seq.* 850; *Dows v. Morewood*, 10 Barb. 183; *United States v. Bradbury*, Davies, 146; *Gass v. Stinson*, 3 Sumner, 98; *McKenzie v. Nevius*, 22 Maine, 138; *Miller v. Miller*, 23 Maine, 24; *United States v. Kirkpatrick*, 9 Wheat. 720; *Postmaster-General v. Furber*, 4 Mason, 386; *Fairchild v. Holley*, 10 Conn. 176; *Smith v. Lloyd*, 11 Leigh, 518; *Baker v. Stackpoole*, 9 Cowen, 485; *Pennell v. Deffell*, 4 De G., M. & G. 391 and note (1).

his hands, Wilson told him to retain what he wanted, as money would be of use to him, the examinant." By this part of his evidence Draper negatives both the questions, namely, whether he had instructions from Wilson to retain his rents in payment of the partnership debt, and whether they were in fact retained by him for that purpose.

I entertain no doubt on this case. As to the costs, I am at present inclined to give the respondent the costs, but I will further consider that matter. There was a discrepancy in the Courts below: if I refuse the costs, it will be inferred, that it is because that difference existed between the Courts below, and every person who will hereafter appeal to this House under similar circumstances, may be under the impression that he will run no risk of incurring costs. Now it happens that I reversed the decision of the Master of the Rolls on grounds to which his attention was not drawn; if it had been drawn to them, he probably would have decided the same way. For these reasons I shall now move your Lordships to affirm the decree; but I shall take further time to consider the question of costs, notwithstanding the affirming of the decree.

The decree below was accordingly affirmed.

July 5.

* 395 * THE LORD CHANCELLOR. — My Lords, judgment was given by your Lordships in this case, but there was a question reserved as to the costs. I think, after consideration, it is a case in which your Lordships ought to allow the costs (they are moderate) of the appeal. I move, therefore, that the judgment be affirmed, with costs.¹

Affirmed, with costs.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1503.

* APPEAL

* 396

FROM THE COURT OF EXCHEQUER IN IRELAND.

BROWN v. TIGHE.

1834.

WILLIAM BROWN, Esq. *Appellant.*
 WILLIAM FREDERICK FOWNES TIGHE and }
 DANIEL TIGHE, Esqrs. } *Respondents.*

Covenant. Renewals in Perpetuity.

A lease made in 1663 of land in Ireland, — together with all mines thereon in the disposal of the lessor, and all timber growing thereon, to be disposed of by the lessee, he planting trees in the room of them, To hold the premises, without impeachment of waste, to him, his executors, administrators, and assigns, for ninety-eight years, at a rent therein mentioned, — contained a covenant that the lessor, his heirs and assigns, should, upon request of the lessee, his executors, administrators, and assigns, from time to time renew the said lease, and perfect such other assurances as the lessee, his executors, administrators, and assigns, should reasonably require for strengthening, confirming, and sure-making the demised premises, at such rents, and under such covenants and conditions, as in the said lease were contained. Another covenant provided that, in case of eviction, or waste by rebellion, the rent should cease and be abated. A renewal of the lease, with all the covenants, was executed in 1739. *Held* by the Lords, affirming the judgment of the Court of Exchequer in Ireland, that the covenant was not for perpetual renewal, but for confirming and further assuring the original lease.¹

June 16, 18.

THE appellant exhibited his bill, in November, 1827, in the Court of Exchequer in Ireland, against the respondents and another, for the purpose of compelling the renewal of a lease. The bill stated, that by an indenture of lease, bearing date the 3d of July, 1663, Richard Tighe, an Alderman of Dublin, demised * to William Wright, of Castledermot, * 397

¹ See *Rutgers v. Hunter*, 6 John. Ch. 215; *Whitlock v. Duffield*, 1 Hoff. Ch. 110; *Carr v. Ellison*, 20 Wend. 178; *Taylor Land. & Ten.* (4th ed.) §§ 333, 334.

in the county of Kildare, all the town and lands of Bal-lireadman, situate in the county of Carlow, and then in the possession of the said William Wright and his assigns, containing 223 acres profitable land, of Irish measure, with all other lands returned as unprofitable or waste, whether woods or underwoods, bogs or barren mountain, as part thereof, together with all warrens, waters, ways, &c., quarries of stone, slate, mines of coal, lead, tin, &c., or any other mines or minerals that were in the disposal of the said Richard Tighe, fishings, fowlings, &c., and also the timber then growing or lying on the said lands, and to make sale and disposal thereof as he or his executors, administrators, or assigns should think fit, to his and their own proper use, without impeachment of or for any waste; they planting five hundred trees of oak or ash in the room of them, and also performing the same from time to time during the said lease; To have and to hold all and singular the said premises, with the appurtenances, without impeachment of waste, unto the said William Wright, his executors, administrators, and assigns, for the term of ninety-eight years from the 29th day of September then next ensuing, at the yearly rent of 15*l.* for the first three years, and the yearly rent of 30*l.* during the remainder of the said term, payable half-yearly, with one sugar-loaf on the first day of January yearly. And the said Richard Tighe, by the said indenture, further covenanted and granted to and with the said William Wright, his executors, administrators, and assigns, that it should be lawful for the said William Wright, his executors, administrators, and assigns, to cut and dispose of all the afore-said woods, and to search, dig, and find out any quarries of stone and slate, or any other mines of coal, lead, tin, * 398 iron, brass, * copper, or any other kind of minerals whatsoever in the disposal of the said Richard Tighe, and the same so sought and found out to have, use, sell, and dispose of, for his and their only proper use and benefit.

The lease contained the following covenants, viz.: That Richard Tighe, his heirs and assigns, should and would, upon request unto him or them to be made by the said William Wright, his executors, administrators, and assigns, from time to

time renew the said lease, and perfect such other (further (a)) assurances as he, the said William Wright, his executors, administrators, and assigns, should reasonably, with their counsel learned in the law, devise, advise, or require for the better strengthening, confirming, and sure-making of all and singular the said demised and granted premises, and every part thereof, unto the said William Wright, his executors, administrators, and assigns, at such rents, and under such covenants and conditions as contained in said indenture of lease; and further, that he, Richard Tighe, his heirs and assigns, should from time to time and at all times thereafter, pay all quit-rents and other rents already due, or thereafter to be due, upon or out of the said demised premises, or any part thereof; and said lease, among other covenants, contained a covenant of warranty of title against all persons claiming by, from, or under the said Alderman Richard Tighe; and that, in case of any eviction by any person lawfully claiming any right to the premises, or that the premises should be wasted, destroyed, or decayed, by any war or rebellion, so that the tenants could not possess the same with safety to their lives or goods, then and for so long the said rent should cease and be abated.

* The bill further stated that the said lessor died intestate, seised of the reversion and rent of said lands; and upon his death William Tighe, of Dublin, his grandson and heir, became seised of said reversion and rent: and that all the estate and interest of the said William Wright, by virtue of said recited lease, became, by assignment thereof, duly vested in Denny Cuffe, of Sandhill, in the county of Carlow: and that, by a certain indenture, bearing date 7th of March, 1739, made between the said William Tighe and Denny Cuffe (after citing the said original lease of the 3rd day of July, 1663, and also the said covenant), the said William Tighe, at the request and desire of the said Denny Cuffe, and in pursuance of said covenant or clause of renewal contained in said recited lease, and for and in consideration of the rents, covenants, and conditions therein contained, demised unto the said Denny Cuffe, his executors, administrators, and assigns, the

(a) This word was in the counterpart, but not in the lessor's part set out in the respondent's case.

aforesaid town-lands and premises, without impeachment of waste, to have and to hold the same unto the said Denny Cuffe, his executors, administrators, and assigns, for the term of ninety-eight years, from the 29th of September then last past, yielding and paying therefore unto the said William Tighe, his heirs and assigns, the yearly rent of 30*l.*, and one sugar-loaf, on the 1st day of January yearly; and said indenture contained all the same clauses, provisions, and covenants as in said original lease, and, amongst others, a covenant for renewal, in the same words as in said original lease.

The said Denny Cuffe died possessed of the said demised premises, by virtue of the aforesaid assignment and indenture of renewal; and upon his death, Sir Jonah Wheeler Denny

Cuffe, Bart., his son and executor, became entitled to * 400 said premises, and entered * into possession thereof;

and he, by indenture of assignment, bearing date the 23d of January, 1812 (after reciting the said renewal of the 7th of March, 1739, and also the covenants for renewal in said deeds contained), in consideration of the sum of 10,000*l.*, duly assigned all the aforesaid premises, and all his estate, title, and interest therein, under and by virtue of the said several indentures, to Robert Brown, of Dublin, Esq., who thereupon and thereby became entitled to the said several lands and premises, and entered into possession thereof, and paid the said yearly rent, and continued so possessed until the time of his death, in January, 1816, having by his will, dated the 14th March, 1814, and duly made and published, devised all the residue of his real and personal estate (which included the aforesaid lands and premises of Ballireadman, and all his estate and interest therein) to the appellant, his eldest son, his executors, administrators, and assigns; and appointed the appellant and Redmond Browne, a younger son of the said Robert Browne, his executors. And the said will was duly proved, and probate thereof granted to the appellant, who by virtue thereof and being so entitled, entered into possession of the said lands and premises, and ever since paid the reserved rent, and performed the said covenants contained in the lease.

The bill further stated, that W. F. F. Tighe, of Woodstock,

in the county of Kilkenny, Esq. (one of the respondents), became seised of the rent and reversion of the said demised lands and premises; and he is heir-at-law of the said William Tighe, party to the said indenture of the 7th day of March, 1739, and also heir-at-law of the said Alderman Richard Tighe, party to the said indenture of the 3d day of July, 1663, and has for several years received from the appellant * the said reserved yearly rent payable out of * 401 said lands; and that on the said respondent's marriage, in April, 1825, a marriage settlement was executed, whereby, among other matters, the said lands and premises were conveyed by the said respondent to the Duke of Richmond and Daniel Tighe, Esq. (the other respondent), and to their heirs and assigns, upon several trusts therein limited.

The bill then stated, that the last-mentioned lease being within a few years of expiring, the appellant applied in March, 1827, and frequently afterwards, to the said W. F. F. Tighe, pursuant to the said covenants contained in the indentures of the 3d day of July, 1663, and the 7th day of March, 1739, to make a further demise to him (appellant) of the same, by way of renewal thereof, but that he declined to execute any renewal. And it prayed that it might be declared that the appellant was entitled to a renewal or new demise of the said premises, for the like term, and subject to the same rents and covenants, as contained in said indentures of the 3d day of July, 1663, and the 7th day of March, 1739; and that the said covenant contained in said original lease was a covenant for the perpetual renewal thereof; and that the respondents might be decreed to execute a renewal to the appellant of said original lease.

The respondent, W. F. F. Tighe, in his answer, admitted the seisin in fee of Alderman Richard Tighe, the indentures of 3d of July, 1663, and 7th of March, 1739, and continued possession thereunder, and the payment of said yearly rent by the said Robert Browne and by the appellant; and also that he, W. F. F. Tighe, was seised from the year 1816 of the reversion and rent of the said premises, as devisee of his father, William Tighe, who had been seised in * fee * 402 thereof, and who was grandson of William Tighe, party

to said indenture of 7th of March, 1739. But the respondent insisted, that on the true construction of the said lease, this covenant was not a covenant for the renewal or extension of the term granted by the said lease, but merely a covenant for further assurance, and for doing such acts as might be necessary for the confirming of the said lease, during the term of ninety-eight years thereby granted ; which covenant was introduced into the said lease in consequence of the imperfect and precarious title under which the lessor held the lands thereby demised at the time of granting said lease, and the prospect he had of acquiring a perfect and sufficient title to enable him to grant or confirm said lease for the term of ninety-eight years. For, that the said lands of Ballireadman, amongst other lands, were, in the Irish rebellion in the year 1641, forfeited to the Crown ; and were, in the year 1659, in the actual possession of one Daniel Hutchinson and the said Richard Tighe, having been set out to them under the Act of Settlement, in satisfaction for provisions furnished for the supply of his Majesty's army in Ireland, in the year 1641 ; and it became an object to them to get their title established, by a decree of the commissioners of forfeited estates, and a grant thereupon from the Crown ; they therefore, in the year 1661, entered into an agreement with Colonel Thomas Piggott, who had considerable influence at that period, that he should put forward their claim to the said commissioners as a trustee for them ; and, on obtaining a decree and grant thereof, he should convey said lands to said Richard Tighe and Daniel Hutchinson. The said Thomas Piggott, in pursuance of the said agreement, exhibited his petition before the commissioners of forfeited estates, appointed under the said

* 403 * Acts of Settlement ; and they by their decree, dated 17th August, 1666, adjudged that the said Thomas Piggott was lawfully and rightfully entitled, among other lands, to the said lands of Ballireadman ; and pursuant to that decree, the said lands were, among other lands, granted to the said Thomas Piggott, by letters-patent, dated the 15th of January, 1667, to hold to him, his heirs and assigns.

The respondent further answered, that Thomas Piggott, having obtained said letters-patent, refused to fulfil his agree-

ment, and convey the lands to the said Richard Tighe and Daniel Hutchinson; whereupon they filed a bill against him in the Court of Chancery, to enforce the performance of the agreement; and by a decree, pronounced February, 1669, it was ordered, that the said Thomas Piggott should convey unto them the lands mentioned in said letters-patent passed in trust in the name of Thomas Piggott; and he accordingly conveyed the same to the said Richard Tighe and Daniel Hutchinson, to hold to them, their heirs and assigns, for ever. And by a division of the lands granted by said letters-patent, the lands of Ballireadman were allotted to the said Richard Tighe as his separate property. The respondent then submitted, that it appeared by the several matters and documents aforesaid, that although the said Richard Tighe was in possession of the said lands of Ballireadman at the time of the execution of the said indenture of the 3d day of July, 1663, yet he was not seised of any legal title in said lands enabling him to make said demise, but had merely a claim thereto under the Acts of Settlement and Explanation, and that he did not acquire a perfect title until the year 1670; and that the state of the title accounted * for and explained * 404 the intention of the parties in introducing into the said indenture of the 3d day of July, 1663, a covenant for further assurance. The said Richard Tighe's estate and interest in said lands afterwards became vested in his grandson, Richard Tighe the younger, who by his will, bearing date the 1st of May, 1735, bequeathed his estate in the county of Carlow, including said lands of Ballireadman, to his son William Tighe for life, with remainder to his first and other sons in tail-male, with other remainders over. The last-mentioned William Tighe, being only tenant for life, on the 7th of March, 1739, executed to said Denny Cuffe the indenture in the pleadings mentioned, purporting to demise the said lands of Ballireadman, as described in the lease of 3d July, 1663, to hold for a term of ninety-eight years, at a like rate and under the same covenants as in said lease of 3d July, 1663, mentioned; and the respondent submitted, that for these reasons he is not bound to execute any renewal or further demise of

the said premises, and that the appellant is not entitled to any further term in the premises.

The respondent, Daniel Tighe, by his answer, admitted that he was trustee under the other respondent's marriage settlement, which comprised the said lands and premises. The Duke of Richmond, the other trustee, being out of the jurisdiction, did not answer.

The evidence on the part of the appellant went to prove the several deeds of 8d of July, 1663, 7th of March, 1739, and 23d of January, 1812; and the evidence on the part of the respondent, W. F. F. Tighe, went to prove the transactions stated in his answer, between Alderman Richard * 405 Tighe, and Colonel Thomas * Piggott, and also to prove that the William Tighe who granted the renewal of the 7th of March, 1739, was tenant for life.

The cause was heard on the Equity side of the Court of Exchequer, in the years 1830 and 1831; that Court, by a decree made on the 15th of February, 1831, dismissed the appellant's bill, with costs. (a)

The appeal was from that decree.

(a) The following observations of Mr. Baron SMITH, in giving his judgment, were frequently referred to in the arguments on the appeal:—

MR. BARON SMITH. — The bill was filed for the renewal of a certain interest, and the question was, whether the instrument which conveyed the interest contained a covenant to renew it? That is, whether a certain clause, relied on by the plaintiff, should be construed to amount to such a covenant. For a time the Court leaned to the opinion that it should, but upon further consideration this first impression was removed. We would not, however, be understood to say, that upon this question of construction, there is not room for weighty argument on both sides; nay, I believe I declare an opinion from which my brethren do not dissent, when I pronounce the case to be one of too much nicety to be free from doubt. But we think the preponderance of facts and reasons justifies a construction of this instrument unfavourable to the plaintiff's claim. My Lord Chief Baron not having been on the bench when this cause was heard, having been counsel in it, and not conceiving that any thing material in the way of discussion can be added to what has been already urged, his Lordship feels the case to be sufficiently ripe for determination, and leaves to those who heard the argument to decide the point. He does so more especially, because the Court, as it was then constituted,

* *Mr. Pemberton* and *Mr. Jacob*, for the appellant. — * 406
The question turns on the meaning of the words

was unanimous in the opinion to which it ultimately came; for it may be right to observe, that in that opinion Lord GUILLIMORE concurred; though whether he had participated in our earlier and transient opinion the other way, my memory does not enable me with any confidence to say. The clause in question contains the word "renew," and it cannot be denied that its occurrence supplies an argument favourable to that construction for which the plaintiff contended. But the utmost that can be contended for, I apprehend to be, that the use of this word "renew" may give rise to a presumption that the passage containing it should be construed to be a covenant for renewal; but to hold that this mere word "renew" is conclusive upon the interpretation of the clause in which we find it, would be to resist established principles and settled rules.

First, it would impugn the maxim, that all presumption is liable to be rebutted, and only becomes conclusive when no rebuttal can be found.

Secondly, it would rescind the principle which pronounces that every portion of an instrument shall be construed agreeably to the apparent intent of the party whose instrument it is, so far as this can be done without conflicting with distinct authorities, or infringing any fundamental rule of law.

Thirdly, to hold a word or sentence in any clause, or even the whole of the clause itself, to be conclusive, would be to desert the guidance of that rule which says, that instead of insulating the portion which we are called on to interpret, we should, on the contrary, connect it with the entire context of whatever instrument contains it, and call the whole in aid of our construction of each part. Nor are these rules confined to wills, though familiarly and eminently applicable to them; they extend as guides of construction to all instruments. We search closely and favour strongly intention in the case of wills, but the law also consults, examines, and promotes intention in the case of deeds. If, unless as a covenant for a renewal of the interest, the clause under discussion would be quite inoperative and unmeaning, that might furnish a cogent argument for that construction which the plaintiff sought to give it; and we must confess that this argument would be fortified by the introduction of a word so usual in such covenants, and so suitable and almost appropriate, as the word "renew." But the clause in question may, without being a covenant to renew the interest, have a meaning and effect not only consistent with the situation of the parties, but even peculiarly adapted to that situation. The title of the lessor at the time of the demise was not free from uncertainty, while at the same time it was one which not only might by events subsequent become more clear, but which even perhaps seemed likely to grow more distinct and firm. What more natural than that under such circumstances the lessee should require, and the lessor give, a covenant that whatever improvement his own title should

* 407 * "from time to time renew;" and is, whether the covenant stated in the pleadings is a covenant for per-

receive, he would share the benefit with this lessee by a new demise, not enlarging his interest, but rendering that interest more unimpeachable and secure? Accordingly, if we look to the language of the clause, we find it undertaking not to renew the term or interest, but the lease. Might not the execution of a new demise, the further assuring and confirming the title of the lessee, become desirable for the security of this latter? Even in ordinary cases of title, unclouded and likely to remain so, covenants for further assurance are often deemed to be not superfluous. But this was not quite an ordinary case. The very date and area of the transaction, with reference to history, suggests to us that it was not so, and that it might not be inexpedient for a lessee to entrench and fence his title. What confusion of title, what loss of muniments, may rebellion not produce; and what on the very face of this demise do we perceive? That the parties contemplated the possibility of rebellion, and stipulated for a suspension of rent in case of its occurrence. A covenant to make a new lease might suit such a state of things. It is not enough to say that the clause in question may be construed to be a covenant for further assurance. It cannot be construed otherwise; it is such a covenant in express and explicit terms; and the only question is, whether it be not something more? Whether it be not also a covenant to enlarge the term? The covenant is to "renew the said lease, and perfect such other further assurances as the lessee, his executors, &c., shall with his counsel reasonably require, for the better strengthening, confirming, and sure-making of the title," &c. Now, in the first place, I take it to be unusual to incorporate a covenant for renewal with one for further assurance. The subject-matters about which they are respectively conversant are different and detached. The one regards the interest presently demised, the other an equitable one to commence in future; yet here what is supposed to be a covenant for renewal, is blended and incorporated with one for further assurance. In the second place, the promise and undertaking to renew the lease, that is, to make a new lease if required, is a promise consonant to the objects of a covenant for further assurance, which, be it what else it may, the clause before us unquestionably is. In the third place, we ought not to lay all the stress upon the word "renew," and reserve no emphasis for the words which follow it, "the lease." If the word renew informs us that something is to be renewed, the words which follow inform us what that something is; and what does this something turn out to be? Not the term, but the lease; not the interest which has been granted, but the muniment by which that interest has been created and secured; the case was more or less peculiar, and therefore perhaps the covenant for further assurance is more particular, emphatic, and defined. The interest here demised was a term of ninety-eight years. Now to make such an interest renewable, I take to be more or less out of the common

petual renewal, or is limited to the perfecting of the
 * original lease by further assurances? It is to be * 408

course;—a deviation which ought to be proved, and will not be presumed; the presumption is the other way. This presumption of adherence to ordinary practice we may stand to until rebutted, and no sufficient rebuttal seems furnished by the circumstances of the present case. Human life is necessarily uncertain and precarious; against this uncertainty it is natural that provision should be made; and accordingly a covenant for renewal is no uncommon appurtenant to a lease *pour autre vie*. Another mode of guarding against this uncertainty, is by lease for lives or years, whichever shall last longest; but I doubt whether in a lease of this description a clause of renewal will be found. If the clause be a covenant for renewal, it is an unqualified covenant for perpetual renewal; and the lessor might, if such were his intention, have at once given the *quasi* perpetuity for a term of nine hundred years. Why did he not make such a lease? May not the answer be, because he did not intend to convey an interest of longer duration than ninety-eight years? But it may be said, that he intended to grant an interest of (say) nine hundred years, but chose to grant it by means of periodical renewals. If, indeed, a renewal fine had been reserved, this answer might be given, and I should be obliged to admit its force, however puzzled to compute the value or inducement of a consideration which was to be paid once a century, and the first payment to be made a century after the perfection of the lease. I might think it a more rational and ordinary course to exact in the first instance a fine proportioned to the value of what, if it were not a blunder, I might call a perpetual term; and having received this adequate fine, to demise the term; but still we should have to admit that the reservation of a substantial renewal fine at once supplied a consideration, and furnished evidence of intent; even a nominal fine, although it would be no consideration, might be equivalent, as furnishing evidence of intention to “renew,” and thus giving a character to the clause in which such a reservation was contained; but here there was no reservation of even a nominal fine. Does not the want of this furnish some evidence negating an intention to renew, especially as reservations of this kind usually, I apprehend, accompany covenants to renew? On the whole, we construe this clause to have been an agreement not to grant a new interest, but, under certain circumstances, to grant a new lease confirming, not enlarging, the interest which the first had given. There is but one fact that can be called material which I have omitted to notice; I mean the subsequent grant by tenant for life. On this part of the case I shall only say, that when the cause was at hearing, the Court expressed an opinion which seemed to be acquiesced in at the time, and which it continues to entertain, namely, that the construction of the instrument in question cannot depend upon or be governed by matters subsequent and extrinsic.

observed that the lease contains a particular covenant against eviction.

* 409 [THE LORD CHANCELLOR. — Your case * is, that this is a covenant to renew from time to time in perpetuity, for the same rent, without any advantage to the lessor. I agree that covenants of this sort may have been common in Ireland; and the reason probably was, that in consequence of the frequent forfeitures there, purchasers of land, instead of paying down the whole purchase-money, adopted this mode of paying it by degrees, under leases renewable in perpetuity. (a)]

Whatever was the motive of the parties, the words of this covenant import clearly an obligation on the lessor "to renew from time to time," at the request of the lessee or his representatives; *Furnival v. Crew*. (b) The lessor parts with his right to the timber, the mines, the minerals, fishery, and every other right which is generally reserved in a lease for a determinable interest. He does not provide by covenant

* 410 for keeping the tenements in repair, or for * giving them up at the end of the lease; on the contrary, the tenant is not punishable for waste, both in the operative part of the lease and again in the *habendum*; and all the clauses are consistent with a lease in perpetuity, but not with a determinable interest.

Independently of the aid given to the construction of this covenant by the whole tenour and context of the lease, the words "from time to time renew" are free from ambiguity, and their obligation is not altered or weakened by the juxtaposition of the words "and perfect other assurances," &c. The construction contended for by the respondents is contrary; not only to the plain import of the words, but to the sense in which their ancestors interpreted them, when the renewal of the original lease was granted in 1739. The same interpretation must have been put on the clause in 1812,

(a) See another reason in *Attorney-General v. Hungerford*, p. 371, *supra*.

(b) 1 Atk. 85.

when the appellant's father gave his 10,000*l.* for the assignment. Both parties, by their acts, have construed and given effect to the clause as a covenant of perpetual renewal; *Cooke v. Booth.* (a)

The Court below received, on the construction of this covenant, much evidence which was extrinsic to the instrument, and therefore wholly inadmissible. The commencement of the lessor's title, in 1663, and the litigation with Colonel Piggott, his trustee, some time after, were not admissible to explain the terms of an indenture which did not in any manner refer to such previous circumstances, and with which the lessee had no privity. In the construction of a written instrument, where there is no ambiguity in the terms, nothing is to be considered but the instrument itself. *Smith v. Earl Jersey,* (b) *Miller v. Travers.* (c)

* The principal reason given for the decree below * 411 is, that the Judges in Ireland lean against covenants for perpetual renewal: that is a reason which ought not to influence this House. Lord ELDON took occasion to express his dissent from the opinion of Lord THURLOW, that those covenants were not to be executed, and to disavow that doctrine; *Willan v. Willan.* (d) If the meaning of the covenant be clear, specific execution ought to be decreed.

Mr. Knight and *Mr. J. Jervis*, for the respondents. — The law, as settled by numerous decisions in England and Ireland, leans against covenants of renewal; and Courts of Equity will not interfere to enforce the specific execution of them, unless the meaning of the parties as to the obligation to renew is clearly expressed. *Baynham v. Guy's Hospital;* (e) *Tritton v. Foote;* (g) *Moore v. Foley;* (h) *Iggulden v. May;* (i) *Harnett v. Yielding.* (k) Renewal leases are common in Ireland, as they are in Devonshire and Cornwall, upon fines like bishops' leases; but no one ever heard of a covenant to

(a) Cowp. 819.

(c) 8 Bing. 244.

(e) 3 Ves. 298.

(h) 6 Ves. 282.

(k) 2 Sch. & Lef. 549.

(b) 2 B. & B. 473.

(d) 16 Ves. 72.

(g) 2 Bro. C. C. 636.

(i) 9 Ves. 332.

renew a lease at the end of every hundred years, which the appellant claims, without any corresponding advantage to the landlord; and no Court would, in a doubtful case, enforce a covenant so improvident and absurd; *Redshaw v. Governor & Co. of Bedford Level*. (a) If such a renewal had been intended by the parties to the original lease, would they not rather at once make a lease for a term of 999 years?

According to the true construction of the lease of *412 *1663, the covenant therein contained, and relied upon by the appellant as a covenant for perpetual renewal, is merely a covenant for further assurance, which was made necessary by the imperfect title of the lessor. The words "from time to time renew the said lease," are followed immediately, in the same sentence, by the words "and perfect such other assurances," &c. The whole context of the clause shows the intention of the parties to be, to make further assurances "for the better strengthening, confirming, and sure-making of all and singular the fore-demised and granted premises." There is no instance known among conveyancers, of a covenant for renewal being thrown into a covenant for further assurance, as this alleged covenant is; and it is remarkable that the words are not to renew the said term, but "the said lease;" upon which distinction Mr. Baron SMITH laid great stress in his judgment. It is also to be observed, that the words in the counterpart executed by the tenant are, "such other assurances;" but in the part executed by the landlord, which alone binds him, they are "such other further assurances;" the words "other further" clearly importing, not a renewal, but additional assurances. The inference from the obligation on the tenant "to plant 500 trees of oak or ash in the room of those cut down by him, and performing the same from time to time during the said lease," is, that the trees so planted were to be for the benefit of the landlord at the expiration of the lease. But if the tenant was to have a perpetual renewal without fine or other consideration, which would amount to an alienation for ever, what benefit could the lessor or his representatives have from the trust? The case of the appellant depends in a great

(a) 1 Eden, 346.

measure on the fact, that a renewal of the original lease, with all the covenants *in it, was granted in *413 1739; but it appears that that renewal was granted by a tenant for life, who had no power to grant such a lease, and whose acts cannot affect the rights of the tenant in fee; *Redshaw v. The Governor & Co. of the Bedford Level*; (a) and it is a well-known rule, both at law and in equity, that written instruments are not to be construed with reference to the subsequent acts of the parties. *Baynham v. Guy's Hospital*; (b) *Moore v. Foley*. (c)

It is not competent for the appellant now to call for the rejection of evidence admitted in the Court below. It consisted of the certificate of the commissioners for executing the act of settlement to Colonel Thomas Piggott, the King's letters-patent to him, the decree of the Court of Chancery directing him to convey the lands therein mentioned to Alderman Tighe and Daniel Hutchinson, the conveyance by him to them, and the will of Richard Tighe, the father of William Tighe the lessor in 1739; all which were proved in the cause, for the purpose of showing the nature of the lessor's title, and the state of the property. The petition of appeal does not object to the evidence, but to the decree: the propriety of the decree is one thing, the propriety of the grounds of the decree a different thing. This being an appeal, and not a rehearing, it is not competent for the parties to open the whole case anew; but they are confined to the matter stated in the petition of appeal.

[THE LORD CHANCELLOR. — In that case the House would permit the appellant to present a new petition of appeal. The House is not bound to confine its view to the evidence presented by the parties, who cannot, by any agreement among themselves, admit or reject evidence. This House is not bound by their agreement.]

* The proofs given in the Court below were clearly *414 admissible in evidence. In the construction of written

(a) 1 Eden, 346.
(c) 6 Ves. 282.

(b) 3 Ves. 298.

instruments you may give evidence, not to contradict or vary the terms of them, but to show the amount and state of the property of the parties, and of their power over the property. *Smith v. Earl Jersey*; (a) *Colpoys v. Colpoys*; (b) *Lowe v. Manners*. (c) All the cases on that point are collected in a treatise by Mr. Wigram, on the application of extrinsic evidence to written instruments. The documents put in evidence in this case showed the imperfect state of the lessor's title when he executed the lease in 1663, and left it open to the Court to judge of the true meaning of the parties to this covenant.

Mr. Pemberton, in reply. — One of their Lordships has intimated his difficulty in construing this to be a covenant for perpetual renewal, because that construction would tend to the alienation of the property, without any advantage to the landlord, beyond the continued fixed rent; which would be unreasonable. It may appear unreasonable to sell an estate, with reservation of a nominal rent; but not so unreasonable, if an adequate consideration is obtained at the time of sale, although it may happen that the adequate price at that time should in the course of time turn out to be under the value. Considering the state of Ireland in 1663, a purchaser might say, "I shall not give you 2000*l.* or 20,000*l.* for that estate, as no man can foresee now what may happen in a few years to deprive me of it; but I shall give you what is equivalent to the full price, by a yearly payment so

* 415 * long as I may hold the estate." It is quite consistent with reason and practice in Ireland, to grant a lease of this kind for the adequate value of the lands, payable annually. The rent of the land may have been more than the interest of the purchase-money. This lease bound the landlord in perpetuity, and the tenant for ninety-eight years. There is nothing unreasonable in such an agreement: houses are constantly let in London for a term, terminable at the option of the tenant, in seven, fourteen, or twenty-one years. This lease was

(a) 2 B. & B. 473; per Justices BURROUGH, PARK, and BAILEY.

(b) Jacob, 451.

(c) 5 B. & Ald. 917; S. C., 4 Russ. 532, n.

to enure to both parties for ninety-eight years, at all events ; the rent to cease in case of eviction or waste by rebellion, but with this covenant, that the tenant was to have a renewal if he wished it. There is nothing unreasonable in such an agreement ; there is no ambiguity in the terms of it ; for to renew the lease is to make a new lease, in substitution of one already made : the words "from time to time" confirm that view, and remove all doubt of the meaning of the clause ; and they are not neutralized by the promise of further assurance. The obligation on the tenant to plant trees has been urged ; but the appellant answers that argument by saying, It is true, it was not a covenant to renew, except at the option of the tenant ; and if he should not choose to renew, then the trees would be useful to the landlord.

THE LORD CHANCELLOR. — My Lords, this case presents a question of difficulty in the construction of a covenant in a deed. For that reason, and because I observe, from the opinions expressed by Mr. Baron SMITH and the other Judges of the Court of Exchequer in Ireland, in a very accurate report, (a) which * has been handed up to me, * 416 that they had considerable doubts upon the case, I shall suggest to your Lordships the propriety of allowing the matter to stand over for consideration. At the same time I should not be doing justice to the parties who are here from Ireland, or to their counsel, if I were not to state my present impressions upon this question. That a covenant for a perpetual renewal must be clear, plain, and distinct, and in terms that will not bear any other construction, is a proposition which is borne out by law, and sanctioned by a series of decided cases, as *Iggulden v. May*, (b) *Harnett v. Yielding*, (c) *Willan v. Willan*. (d) It is true that Lord Keeper Henley, in the case of *Redshaw v. The Governor & Co. of the Bedford Level*, (e) expressed a strong determination not to decree specific performance of a covenant, "because, if it was a covenant for a renewable perpetuity, it was without adequate

(a) 4 Law Recorder (Irish Reports).

(b) 9 Ves. 325.

(c) 2 Sch. & Lef. 557.

(d) 16 Ves. 72.

(e) 1 Eden, 347.

consideration to the landlord, and therefore improvident and absurd." That was carrying the leaning of the Courts against covenants for renewal too far, and that doctrine was disapproved of and disavowed by Lord ELDON in *Iggulden v. May*, and again in *Willan v. Willan*. Lord THURLOW, too, expressed himself strongly against covenants for renewal in *Somerville v. Chapman*, (a) *Rees v. Lord Dacre*, (b) and another case the name of which I do not remember. But it appears by the case of *Tritton v. Foot*, (c) that Lord THURLOW did not adhere to his former opinion. By looking * 417 into the facts of this last case, and * into Lord THURLOW's judgment, it may be seen that he modified his former opinion most materially, and did not hold the strong tone which he used in the preceding cases.

The law is now settled, that if parties clearly express in the covenant their intention to renew, it must be so construed and enforced. But that intention must be clearly and distinctly apparent from the reading of the instrument, and must be free from ambiguity. The construction of these covenants is the same in equity as it is at law. Damages would be given at law for not renewing, as a breach of the covenant. A Court of Equity can, on the same principle, give the thing itself—a more adequate remedy than damages—and it will effectuate the intention of the parties, and hold the lessor bound to renew according to his clearly expressed intention. There is nothing in the case of *Cooke v. Booth* (d) to alter or vary this doctrine. The case of *Guy's Hospital* also is clearly in support of it, and the same principle is recognized in *Moore v. Foley*. (e) In the report of this last case an inaccurate reference is made to the reasoning of Lord HARDWICKE, in his judgment in the case of *Furnival v. Crew*. The discrepancy is very material in respect to the present case. Sir WILLIAM GRANT is made to say, in *Moore v. Foley*, "The words are not 'from time to time,' as in *Furnival v. Crew*; upon which words Lord HARDWICKE laid great stress,

(a) 1 Bro. C. C. 61.

(b) Cited in 9 Ves. 332, more fully stated in 1 Harg. Jurid. Arg. 438.

(c) 2 Bro. C. C. 636; S. C., 2 Cox, 174.

(d) 1 Cowp. 819.

(e) 6 Ves. 232.

as amounting to an obligation to fill up lives upon the dropping at any time" (p. 236). Let us now look to 3d Atkins, 83, to which his Honor is made by the report to refer, and you will find the reference is inaccurate. The report by Atkins appears to be a *full and accurate one. In * 418 the judgment—and assuredly a very able judgment it is—Lord HARDWICKE says (p. 85), "Then come the following words: 'and so to continue the renewing of such lease or leases to Thomas Moore, or his assigns, paying as aforesaid.'" Upon the words "from time to time" he makes no comment, and they do not come into this part of the passage. Then follows his construction of those words, "so to continue." "It has been argued for the defendant," says he, "that these words mean only to continue the lease by adding a new life on the death of the first lessees only; but I am of opinion that those words do not mean barely continuing a new life, but continuing and filling up the estate from time to time." Lord HARDWICKE, therefore, does not lay the stress upon the words "from time to time," as the report of *Moore v. Foley* makes his Honor, Sir WILLIAM GRANT, state him to have done. Lord HARDWICKE says, "The words are 'so to continue the renewing,'" and the inference he drew from these words, and the argument he built on them was, that the party using them meant to bind himself and his successors to continue to renew from time to time. But the material words are not "from time to time," and it does not at all follow that Lord HARDWICKE would have said, if the words had been "from time to time" in the lease, without the words "so to continue," they would have raised the same inference; it is possible he might, but it does not follow as a necessary consequence. When you look at the words of the lease itself you find what has probably led to the mistake; there are in the lease the words "from time to time," but they are not properly part of the obligation to renew. The words are, shall "execute one or more lease or leases, under the same rents and covenants, and so continue * the renewing of such lease or leases to Thomas * 419 Moore, or his assigns, paying as aforesaid to John Crew, his heirs or assigns, 68*l.* for every life so added or

renewed from time to time." Therefore it is not that he covenants to renew from time to time, but that he covenants "to renew and continue renewing;" and those are the words on which Lord HARDWICKE rested his judgment.

As at present advised, I am of opinion that the authorities are in favour of the construction put on the covenant in this lease, by the Judges of the Court in Ireland. Even supposing that the words "from time to time" were the material words in the case decided by Lord HARDWICKE, and that the words "to renew from time to time" meant generally a covenant for perpetual renewal, still all that may well consist with the judgment of the Court in Ireland; for these reasons, because, though the custom prevails in the north of England to renew, as it does in Ireland, still it is upon some consideration to the lessor; because no one ever saw, in a regular conveyance, a covenant for renewal in the middle of covenants for further assurance. And a further reason for distinguishing this from former cases is, that here the lessee is bound to plant five hundred trees in the room of those disposed of. If a man lets land for thirty or fifty years, it is very beneficial to him that he should have a well-timbered estate; but if he lets the land for one thousand years, what use is it to him to have timber on the estate? I admit that the explanation on that point given by the appellant's counsel may apply, but I do not think that that was the intention of the parties.

Again, looking at the words which immediately follow, "and perfect other assurances," I think it almost impossible for any man more strongly to signify his intention to be to covenant for further assurance of the existing lease. On these grounds my opinion at present is, that the Judges of the Court below came to a right conclusion in the construction of this covenant; but I wish to have time to look into the cases, and to consider of the costs. If I find no reason to change my opinion, I may not mention the matter again.

August 15.

The case was further considered, and the decree of the Court below was affirmed, with costs not exceeding 150*l*.

* APPEAL

* 421

FROM THE COURT OF CHANCERY.

CANDY v. CAMPBELL.

1834.

CHARLES CANDY *Appellant.*
 Sir ROBERT CAMPBELL, Bart., and DANIEL }
 STUART, Esq. } *Respondents.*¹

Will. Construction. Failure of Issue.

A testator bequeathed 20,000*l.* to C. H., his natural daughter; but in case of her death without lawful issue, he willed the money so left to be equally divided betwixt his nephews and nieces, "who may be living at the time." He also left to C. A. H., his niece 3000*l.*; but in case of her death, without issue, to revert back, and be divided betwixt his nephews and nieces, who might then be living. The residue of his property he directed to be divided into fifteen shares, to be for his other fifteen nephews and nieces, after the deaths of their parents respectively. C. H. and all the nephews and nieces survived the testator, and C. H. died some time after, under age and unmarried, having made a will bequeathing the 20,000*l.* Held, that C. H. took an absolute interest in the 20,000*l.*, and that the limitation over was void for remoteness.²

June 19.

JOHN HARDING, of Culworth, in the county of Northampton, by his last will, dated the 3d of January, 1826, gave and bequeathed as follows: "To my adopted daughter, commonly

¹ S. C., 8 Bligh N. S. 469.

² See Hall v. Priest, 6 Gray, 18, 21, 22; Albee v. Carpenter, 12 Cush. 382; Nightingale v. Burrell, 15 Pick. 104; Bell v. Scammon, 15 N. H. 381; Ladd v. Harvey, 21 N. H. 514; Moffat v. Strong, 10 John. 12; Newton v. Griffith, 1 Harr. & J. 111; Brummet v. Barber, 2 Hill (S. Car.), 544, 545; Williams v. Turner, 10 Yerger, 287; Robards v. Jones, 4 Ired. 53; Usilton v. Usilton, 3 Md. Ch. 36; Flinn v. Davis, 18 Ala. 132; Powell v. Glynn, 21 Ala. 458; Maryck v. Vanderhorst, 1 Bailey Eq. 48; 4 Kent, 281, 282; Jenkins v. Hughes, 8 H. L. Cas. 571; 2 Jar-

called Caroline Harding, the sum of 20,000*l.* three per cent consols, and my house and landed property at Culworth, also that at Morton Pinkey; but in case of her death without lawful issue, I then will the money so left to her to be equally

divided betwixt my nephews and nieces who may be liv-

* 422 ing at the time; and the land, &c., at * Culworth to my

nephew the Rev. James Harding, and that at Morton

Pinkey to my nephew Lieutenant John Harding, Madras

Establishment. And I request my much-esteemed friends,

Robert Campbell and Daniel Stuart, Esqrs., to be her guard-

ians, and allow whatever they please for her education

annually, and after she has left school; and if she marries,

it must be with their consent, and the property to be solely

settled upon herself and children, and in no way changed

or alienated." "I leave to each niece and nephew of mine

the sum of 1,000*l.*, and to Charlotte Ann Harding my niece,

daughter of my late brother Francis, the sum of 3,000*l.*, but in

case of her death without issue, this 3,000*l.* to revert back, and

to be divided betwixt my nephews and nieces who may then be

living." The testator, after giving some other legacies, added:

"What property I may die possessed of, not otherwise appro-

priated, I divide into fifteen shares; seven of which to be for

my brother William, and after him to his seven children; five

for my sister Candy, and after her to her five children; and

the remaining three to my sister Wright, and her children

afterwards. I permit my sister to live at Culworth where she

is, for the term of her natural life, if she pleases, in common

with my natural daughter commonly called Caroline Harding,

for in her, it is to be understood, the household furniture,

man Wills (3d Eng. ed.), 230, 428, 429; (4th Am. ed.) 301, [418] *et seq.*;

1 ib. 677, note. In *Albee v. Carpenter*, 12 Cush. 382, it was held that

any words in a devise of real estate, which would give an estate-tail

to the first taker, with or without a remainder over, will, in a bequest

of personal property, give the first taker an absolute estate; and any re-

mainder over is void. But the courts, according to Mr. Fearne, lay hold

of any circumstance, however slight, and create almost imperceptible

shades of distinction, to support limitations over of personal estate.

Fearne on Executory Devises, by Powell, 186, 239, 259; 4 Kent, 282;

Dashiell v. Dashiell, 2 Harr. & G. 127; *Eichelberger v. Barretz*, 17 Serg.

& R. 293; *Ladd v. Harvey*, 21 N. H. 514.

wines, and books are vested, only selling such property as may not be required for use. This child Caroline will not leave school for good for some years, therefore Mrs. Candy will pay for all she wants except rent for land," &c. And he appointed his brother William, his sister Ann Candy, and the Rev. James Harding his nephew, together with Robert Campbell and Daniel Stuart, his executors in this country; and his nephews, Lieutenants * George and Thomas * 423 Candy, in Bombay, his executors in India.

The testator died a few days after the date of this will, without lawful issue, and left surviving him the said Caroline Harding, the Rev. William Harding, Mrs. Ann Candy and Mrs. Charlotte Wright, and sixteen nephews and nieces, seven of whom were the children of his said brother William; five, the children of Mrs. Candy; three, the children of Mrs. Wright; and one, the only child of another brother, Francis Harding, who died before the testator. The will was proved by the executors in this country, except Mrs. Candy, to whom the usual power was reserved.

In February, 1826, the respondents and Caroline Harding, by the respondent Sir Robert Campbell, her next friend, exhibited their bill in Chancery against the said brother (William) and sisters, and all the nephews and nieces of the testator, insisting (among other things) that Caroline Harding was entitled to an absolute interest in the legacy of 20,000*l.* three per cent consolidated annuities, and that the bequest over of the same, in case of her death without lawful issue, was void; and praying (among other things) that an account might be taken of the testator's personal estate, and of his funeral expenses, debts, and legacies; and that his personal estate might be applied in payment thereof, and that the said legacy of 20,000*l.* might be secured for the benefit of Caroline Harding, and that she might be declared to be absolutely entitled thereto.

The defendants put in their answers to the bill, and the cause was heard in December, 1826, before the Master of the Rolls, who directed a reference to the Master to take the accounts as prayed by the bill, to approve of proper persons to be guardians of * Caroline Harding, * 424

to state the amount of her fortune, and to inquire what would be a proper allowance for her maintenance and education; as to which the Master was at liberty to make a separate report.

The Master, by his separate report, certified (among other things) that Caroline Harding was entitled, under the will, to an absolute interest in the sum of 20,000*l.* three per cent consolidated annuities, subject to such direction for a settlement as is in the will mentioned. The Master having subsequently made his general report, the cause came on to be heard before the Vice-Chancellor for further directions, and a decree was made in July, 1829, whereby it was (among other things) declared that Caroline Harding was, under the said will, entitled absolutely to the said sum of 20,000*l.* bank annuities.

The appellant and his wife, and Francis Candy, and Charlotte Anne Harding, four of the testator's nephews and nieces, defendants to the suits, appealed to the Lord Chancellor from several parts of that decree, more particularly from that part of it declaring Caroline Harding absolutely entitled to the legacy of 20,000*l.*

Caroline Harding died in October, 1830, an infant, and unmarried, having duly made her will, whereby she appointed the respondents her executors, and they obtained probate thereof and became her legal personal representatives. In consequence of the deaths, and also of the marriages of others of the parties to the suit, several bills of revivor became necessary from time to time, and the appeal to the Lord Chancellor was not heard until July, 1831, when his Lordship was pleased to dismiss the appeal, and to affirm the decree of the Vice-Chancellor.

The appellants further appealed to this House from
 * 425 * so much of the decree as declared Caroline Harding absolutely entitled to the legacy of 20,000*l.*

Mr. Twiss and *Mr. Hodgkin*, for the appellant, urged the same arguments which they had before used in support of the appeal to the Lord Chancellor, and which, together with his Lordship's judgment, have (since the first part of this

case was sent to press) been very fully reported under the title *Campbell v. Harding*, 2 Russ. & Mylne, 390. In addition to the cases there mentioned they cited in this appeal *Luddington v. Kime*, (a) *Sherrer v. Bishop*, (b) and *Blamire v. Geldart* (c). The following were the propositions for which they contended: That the gift over of the 20,000*l.* to the testator's nephews and nieces was not a limitation after an indefinite failure of issue: the directions for a settlement showed the testator to have intended that Caroline Harding should take only a life interest, with a limitation to her children as purchasers; and, in that view, the gift over on her death without issue was in effect a mere alternative or substitutionary limitation, in the event of there being no such issue: That it appeared, from the nature of the ulterior dispositions, and from the description of the persons to whom they were made, that the testator contemplated a proximate, and not a remote or indefinite failure of issue: That in construing a bequest of personalty, the law was anxious to lay hold of every expression and circumstance which might relieve the case from that technical construction of the words "death without issue" (as signifying failure of issue at any period, however remote), which, where such expressions and circumstances *were wanting, had been suffered to * 426 creep in by analogy to the doctrine in devises of realty; and for the purposes stated (as in every other case of construction), recourse was to be had to all parts of the instruments which were capable of throwing any light on the intention of the testator; but the connection of the subjects, and the order of the events, were more to be regarded therein than the position of the clauses: That in construing the will of an illiterate person, written by himself without professional assistance (of which circumstances the present will presented internal evidence), it was a rule that his expressions were not to be taken in their technical sense, if there were reasonable grounds for inferring that he used them in their natural and popular sense.

(a) *Ld. Raym.* 203.(b) 4 *Bro. C. C.* 55.(c) 16 *Ves.* 314.

Sir Edward Sugden, with whom was *Mr. Matthews*, for the respondent, was proceeding to support the decree of the Court below —

THE LORD CHANCELLOR. — You may go on, if you think proper, *Sir Edward Sugden*; but I tell you, that if the appeal was from any other Judge than myself, I should not think it necessary to hear you.

Sir Edward Sugden. — After that intimation, and as I have not the least doubt of the propriety of the decree of the Court below, I do not think I ought to take up your Lordships' time.

THE LORD CHANCELLOR. — My Lords, being aware that this case, which is an appeal from a judgment of my own, was appointed to be heard by your Lordships to-day, I * 427 took an opportunity of looking into it * last night, and I gave it some consideration. I had not then the opportunity of referring to my judgment in the case of *Malcolm v. Taylor*, (a) in which I had, in the Court of Chancery, decided a point bearing closely on the question presented for your Lordships' judgment in this case. I am now fully reminded of all the points of that case, by what has been urged at your Lordships' bar by the learned counsel for the appellant; and I find, on looking into a note of my judgment in that case, that the main grounds of it are essentially different from those upon which I had come to a different conclusion in the present case. [His Lordship having stated the facts of the case of *Malcolm v. Taylor*, and the reasons for his judgment in it, proceeded:] The law was formerly doubtful as applied to cases of this description; but it is now quite settled, that if a gift is made to A., and on failure of issue, or if A. die without issue, then to B., such a bequest over, whether it be of real estate or of personalty, — being taken in the legal signification of the terms to mean after a general failure of issue, a failure of issue at any time, — is void for remoteness, and the absolute interest is given to the first taker; unless there

(a) 2 Russ. & Myl. 416.

appears something in the will indicating a different intention.¹ It is true, as has been urged in the argument at the bar, that you are not, in construing the bequest, restricted to that part only of the will ; but you may, for the purpose of collecting the testator's intentions, look to other parts of it, and to the whole context. The proof of a different intention is cast on him who would distort the words of the bequest from their general and legal signification. There is a very useful book, but to which I do not refer as authority, I mean Mr. Jarman's edition of * Powell on Devises, in which the * 428 editor arranges, under five heads, the law on this subject, and collects the cases applicable to each (a). I cannot lay out of my view of this case the decision in *Barlow v. Salter* (b). No one can read that case without seeing that Sir WILLIAM GRANT had directed his mind to such a question as the case now before your Lordships presents. [His Lordship stated that case and observed:] That was a stronger case than this for restricting the generality of the words "dying without issue," inasmuch as the gift over in that case was to four particular persons by name. The words of the bequest over here are, "In case of her death without lawful issue, I then will the money so left to her to be equally divided betwixt my nephews and nieces who may be living at the time." The words "then" and "living at the time" cannot be read so as to restrict the general words "her death without issue." I have considered this case in all its bearings, and I have no doubt that my judgment, pronounced in 1831, was borne out by law and by the authorities. I have also spoken to some of the learned Judges about it; and if they had given me reason to suppose that my judgment in it was not well founded, I would have had one of them here with your Lordships to hear the argument. But my opinion remains unchanged, and I now move your Lordships to affirm the decree below; but—notwithstanding that it is an appeal from two consecutive judgments, one affirming the other—I do not say with costs.

The judgment was accordingly affirmed, without costs.

(a) 2 Treat. on the Const. of Devises, 564.

(b) 17 Ves. 479.

¹ See *ante*, 421, note; 4 Kent, 273-283.

FROM THE COURT OF CHANCERY.

CAMPBELL *v.* SANDFORD.

1834.

| | | |
|---|---|--------------------|
| JOHN GRAHAM CAMPBELL, Esq., and DAME MARGARET HAY, Widow, late MARGARET CAMPBELL, Spinster | } | <i>Appellants.</i> |
| ERSKINE DOUGLAS SANDFORD, Esq., succeeding to WILLIAM GRAHAM, Esq., as Admin- istrator <i>de bonis non</i> of WILLIAM GRAHAM, late of the Island of Jamaica, Esq., de- ceased | } | <i>Respondent.</i> |

Legacy. Limitations.

A testator, living in Jamaica, gave, by his will, legacies of 1000*l.* and 1000*l.* to A., and of 500*l.* each to B. and C., who also resided there, and directed that they should be paid out of the money due to him upon bonds given by the said A. The testator afterwards went to Scotland, where he died in 1790. The legatees left Jamaica in the same year. Probate of the will was granted there in 1791, and the bonds due from A. were put in suit by the executor. In 1818 the legacies given to B. and C. were purchased by A., their near relative, for 25*l.* each. In 1821, administration, with the will of the testator annexed, was, for the first time, taken out in this country, and in that year A. filed his bill, claiming payment of these legacies. *Held*, that a Court of Equity might, after such a lapse of time, consider all the circumstances of the case, and presume the legacies to be satisfied.¹

July 16, August 12.

WILLIAM GRAHAM, late of the island of Jamaica, Esq., being resident in the said island, made his will dated 17th June, 1768, and thereby bequeathed to John Campbell, of

¹ Before 3 & 4 Wm. 4, c. 27, in England, it had been repeatedly held, that the Statute of Limitations could not be pleaded to suits for the recovery of legacies; although the Court, after the lapse of a great length

New Hope, in the parish of Westmorland, in the said island, Esq. (since deceased), the sum of 1000*l.* of current money of Jamaica, and to Henrietta Campbell (now deceased), and to the appellant Margaret Hay, then Margaret Campbell, spinster, the sum of 500*l.* Jamaica currency, each, to be paid them when they should arrive at the age of *sixteen *430 years; and the said testator desired that the said legacies should be paid out of the money due to him on bonds from the said John Campbell (the legatee), and his mother; and he appointed executors.

The testator afterwards made a codicil to his will, dated 18th June, 1772, giving unto the said John Campbell a further sum of 1000*l.* current money of Jamaica.

Campbell the legatee was, in the month of October, 1773, indebted to the testator in the sum of 2636*l.* sterling money; and for securing the payment thereof, with interest, he executed a bond to the testator, bearing date 28th October, 1773, in the penal sum of 5272*l.* sterling, conditioned to be void on payment of 2636*l.* sterling, and interest, on 28th October, 1774; and in March, 1774, Campbell was indebted to the testator in the further sum of 700*l.* sterling; and for securing the repayment thereof, with interest, he executed another bond to the testator, dated 25th March, 1774, in the further penal sum of 1400*l.* sterling, conditioned to be void on payment by him of 700*l.* sterling, with interest, on 25th March, 1775.

The testator, after the date of the codicil, quitted the

of time, under certain circumstances, presumed payment. See 1 Dan. Ch. Pr. (4th Am. ed.) 652; *Souzer v. De Meyer*, 2 Paige, 574; *Kane v. Bloodgood*, 7 John. Ch. 90; *Andrews v. Sparhawk*, 13 Pick. 393; *Arden v. Arden*, 1 John. Ch. 313; *Irby v. M'Crea*, 4 Desaus. 422; *Wilson v. Kilcannon*, 4 Hayw. 185; *Henderson v. Atkins*, 28 L. J. Ch. N. S. 913. It is now, however, provided by § 42 of the above Act, that no interest in respect of any legacy shall be recovered but within six years next after the same shall have become due, or next after an acknowledgment of the same shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent. 1 Dan. Ch. Pr. (4th Am. ed.) 652. And by § 40, no suit for any legacy can be sustained but within twenty years. See *Cadbury v. Smith*, L. R. 9 Eq. 48; *Angell Limitations* (4th ed.), App. xiv., xv.

island, and went to reside in Scotland, where he was domiciled at the time of his death, which happened on the 1st December, 1790. The testator never in any manner revoked or altered his will or codicil.

Campbell the legatee, and Henrietta Campbell and Dame Margaret Hay, who were brother and sisters, were all born in the island of Jamaica, and were domiciled there at the several dates of the will and codicil, and also at the time of the testator's death. Margaret Hay, who was the youngest of the three legatees, attained her age of sixteen years in the year 1773. All the said three legatees quitted the said

* 481 * island in or about the month of December, 1790, and none of them ever afterwards returned there.

The will was never proved by any of the executors named therein, either in Jamaica or in England, but letters of administration, with the will and codicil annexed, were on 15th August, 1791, granted by the Court in Jamaica to one James Graham, but were afterwards revoked, and thereupon letters of administration, dated the 17th day of May, 1793, with the will and codicil annexed, were granted by the proper Court in the island, to John Graham, of the parish of Westmorland, Jamaica, surgeon.

John Graham, after obtaining these letters of administration, commenced two actions at law in the Courts of the said island, upon the two bonds, against John Campbell, the legatee, and on the 2d June, 1794, recovered the full amount of the penalty in each, together with 16*l.* 13*s.* 9*d.* for costs of suit in each action.

John Graham died soon after the date of the said judgments, and thereupon letters of administration *de bonis non*, dated the 30th of August, 1794, with the said will and codicil annexed, were granted by the proper Court in the said island to David Home and James Graham. Both these gentlemen died in 1818, and letters of administration *de bonis non* of the testator William Graham, were granted by the proper Court in Jamaica to Wellwood Hislop, of that island.

No steps were taken in the lifetime of J. Campbell, the legatee, to enforce payment of the money recovered by the judgments; and in the year 1801, J. Campbell, the legatee,

died, having made his will, dated 19th July, 1799, which was afterwards proved by Helen Campbell, his widow and executrix, in the Prerogative Court of Canterbury; but the executrix * having declined to prove the same * 432 in the island of Jamaica, letters of administration, with the will annexed, were, in October, 1803, duly granted by the proper Court in the island to the appellant, John Graham Campbell, the son of John Campbell, deceased; and Helen Campbell having died before May, 1810, letters of administration *de bonis non*, dated in that month, with the will annexed, were duly granted by the Prerogative Court of Canterbury to John Graham Campbell, who thereby became the personal representative of John Campbell, the legatee, both in the said island and in this country.

Henrietta Campbell and Dame Margaret Hay, by an indenture dated the 14th day of December, 1818, made between the said Henrietta Campbell, then residing at Boulogne, spinster, and the appellant Dame Margaret Hay, of the same place, of the one part, and the appellant John Graham Campbell, of the other part, after reciting, among other things, that the said legacies of 500*l.* and 500*l.*, together with the interest accrued due thereon, still remained due and owing to them, they the said Henrietta Campbell and the appellant Dame Margaret Hay, in consideration of 25*l.* to each of them paid by the appellant John Graham Campbell, and also in consideration of the friendship and regard which the said Henrietta Campbell and the appellant Dame Margaret Hay respectively had for the appellant John Graham Campbell (therein described to be their nephew), and of the benefits and friendly attention and assistance they had theretofore, on various occasions, received from him, did bargain, assign, &c., the said several legacies of 500*l.* and 500*l.* Jamaica currency, and all interest then accrued due and thereafter to accrue due thereon respectively, to him, his executors, administrators and assigns.

* In the month of August, 1819, William Graham * 433 filed his bill of complaint in the Court of Chancery against the appellant John Graham Campbell; and such bill was afterwards amended, by making James Campbell and

Anna Maria Campbell codefendants, they being the persons entitled under the will of the said John Campbell, deceased, to his real estates; and by such bill, after stating the will and codicil, and the judgments, prayed an account, and also the appointment of a proper person to collect the debts, &c., of the deceased, and for relief generally.

John Graham Campbell filed his answer in June, 1820, and alleged that he was an entire stranger to the circumstances in the said bill stated, as to the said bonds and judgments, and as to the title of the respondent to the same; and in case the respondent should establish his title thereto, then the appellant claimed a right to set off the several legacies and interest.

On the 31st day of October, 1821, the appellants, together with Henrietta Campbell, filed their cross-bill in Chancery against the respondent William Graham, thereby praying, amongst other things, that an account might be taken of what was due for principal and interest, in respect of the said legacies of 1000*l.* and 1000*l.*, and 500*l.* and 500*l.*, Jamaica currency, so then become vested in the appellant John Graham Campbell as aforesaid: and that the respondent William Graham might either admit assets of the testator William Graham, come to his hands, sufficient to pay what should be found due for principal and interest in respect of the said legacies, and might pay the same accordingly, deducting what (if any thing) should be found due to him from the appellant John Graham Campbell, in respect of the

* 484 * matters alleged in the said bill of the respondent, or that the respondent might account in the usual manner for the personal estate and effects of the testator William Graham, come to his possession or power, and that the same might be applied in a due course of administration, and that thereout the appellant John Graham Campbell might be paid what should be found justly due to him, after making all just allowances.

On the 19th day of November, 1821, letters of administration of the testator William Graham, with his will and codicil annexed, were granted to the respondent William Graham by the Prerogative Court of Canterbury, by means whereof

there was, for the first time, a personal representative of the testator William Graham, in England.

On the 20th day of November, 1821, the original cause of *Graham v. Campbell* came on to be heard before his Honor the Vice-Chancellor, and by the decree then made it was referred to Mr. Alexander, then one of the Masters of the said Court, to inquire and state to the Court, whether the estate of John Campbell, deceased, was indebted to the respondent William Graham, as administrator of the testator William Graham, in any and what sum of money on both or either of the said judgments. On the 24th day of November, 1821, the respondent William Graham filed his answer to the cross-bill, and insisted, amongst other things, that the legacies ought to be considered as having been adeemed in consequence of there having been no bonds due from John Campbell and his mother to the testator William Graham, at his decease. He admitted the possession of the personal estate of the testator William Graham to some amount, but stated that the personal estate * and the proceeds of * 435 the real estates of the testator William Graham were so blended together, that he was unable to set forth, with any degree of precision, the amount of such personal estate, or whether or not the same was more than sufficient to pay the legacies and the interest thereon. Master Alexander made his report in the cause of *Graham v. Campbell*, dated 22d May, 1822, and thereby, after stating the bonds and judgments, he found that the estate of the testator John Campbell was, in respect of the two judgments for debts and costs, indebted to the estate of the testator William Graham in sums amounting together to the sum of 6708*l.* 5*s.* sterling. To this report W. Graham took an exception, for that the Master ought to have certified that there was due to him as such administrator, in addition to the sums above mentioned, interest at the rate of 6*l.* per cent per annum upon the two principal sums recovered by the judgments, down to the date of the report. The said cause, *Graham v. Campbell*, came on for hearing upon this exception, and for further directions, on 25th July, 1822, before the Vice-Chancellor, when the said exception was overruled, and it was referred to the said

Master, amongst other things, to take an account of what was due to the respondent William Graham, and all other the creditors of John Campbell, deceased, and to take the usual accounts of the personal estate of John Campbell, deceased, come to the hands of the said appellant John Graham Campbell, and also to take an account of the rents and profits of the real estates of John Campbell, deceased, received by the appellant John Graham Campbell. On the 25th February, 1823, the cross-cause of *Campbell v. Graham* came on to be heard before the Vice-Chancellor, when a decree

* 436 was made therein, by which * it was referred to the

Master to inquire whether the said legacies of 1000*l.* and 1000*l.*, 500*l.* and 500*l.*, or any of them, or any and what part thereof respectively, were then due and payable, and the said Master was to be at liberty to state any matter specially to the Court at the request of either party; and in case the Master should find that the several legacies, or any of them, or any part thereof, were then due and payable, then the Master was to take an account of what was due for principal and interest in respect of such legacies respectively. Before any report was made under this decree, Henrietta Campbell died.

Mr. Wingfield, the Master to whom the cause of *Campbell v. Graham* stood transferred, made his report, dated 11th April, 1829, and found, amongst other things, that the legacies of 1000*l.* and 1000*l.*, 500*l.* and 500*l.*, Jamaica currency, together with all interest accrued thereon, then remained due and payable and wholly unsatisfied; and the Master certified that there was then due for the principal and interest of the several legacies, to the 11th April, 1829, the sum of 5243*l.* 15*s.* 11*d.*: and the said Master further certified, that the respondent William Graham had stated and charged before him, that inasmuch as no such bonds from the said John Campbell, deceased, and his mother, as are mentioned by the testator William Graham in his said will, were found to be in existence at the time of his death, the said legacies ought to be considered as having been adeemed, or if not adeemed, that they ought to be presumed to have been paid and satisfied, or otherwise, that no interest was due upon the

said several legacies, and that the principal sum due in respect thereof ought to be set off and deducted from the amount due to the respondent William Graham upon * the said bonds and judgments, as on the 1st day of * 437 December, 1791, being one year after the death of the said testator William Graham, and that interest should thereafter be calculated upon the amount remaining due upon the said bonds and judgments after such deduction, until the same should amount to the said sum of 6703*l.* 5*s.*; and that the Court having decided (upon the said exception taken as aforesaid to the said report made in the above-mentioned cause of *Graham v. Campbell*) that no interest should be calculated beyond that amount, in respect that the said judgments were for the penalties of the said bonds, the said sum of 6703*l.* 5*s.* would still remain due and owing to him the respondent William Graham, upon and by virtue of the said judgments, after deducting the amount of the said legacies, at the end of one year after the death of the said testator William Graham, in manner above mentioned: and the said Master thereby further certified, that upon consideration of the circumstances thereinbefore set forth, and of the evidence laid before him, it did not appear to him that it ought to be found that the said legacies were to be considered as having been adeemed, or that they were paid and satisfied, or that no interest was due upon the said legacies, or that the principal sums thereof should be set off and deducted from the amount due to the respondent William Graham, upon the said bonds and judgments, as on the said 1st day of December, 1791, and the interest thereafter calculated upon the amount which would then remain due upon the said bonds and judgments after such deduction, until the same should amount to 6703*l.* 5*s.*

To this report the respondent William Graham took six several exceptions:—

* First, for that the Master had reported the said * 438 legacies of 1000*l.* and 1000*l.* to be due, together with interest for the same from the 1st day of December, 1791, being one year after the testator's death, up to the 11th of April, 1829, the date of the said report; whereas the Master

ought to have certified that there is not any thing due to the said complainant in respect of the said two legacies, or either of them.

A similar exception was taken as to the report on the legacies of 500*l.* and 500*l.*

Third, that the Master ought to have found that the said legacies are to be considered adeemed, or otherwise that it ought to be presumed that the same were paid and satisfied.

Fourth, that the Master ought to have certified that the principal of the legacies of 1000*l.* and 1000*l.* should be set off and deducted from the amount due to the said defendant upon the said bonds and judgments as in the said report mentioned as on the said 1st day of December, 1791, and that interest should thereafter be calculated upon the amount remaining due upon the said bonds and judgments after such deduction, until the same should amount to the said sum of 6703*l.* 5*s.*

A fifth exception was taken, in similar terms, to the Master's report as to the two legacies of 500*l.* and 500*l.*

The sixth exception was, that the said Master had calculated and ascertained the amount or value in sterling money of the four several legacies of 1000*l.*, 1000*l.*, 500*l.* and 500*l.*, Jamaica currency, and the interest thereon respectively, according to the par rate of exchange between Jamaica and England, and had accordingly found that there is now due to the said John Graham Campbell, for the aforesaid
 * 439 several *legacies of 1000*l.* and 1000*l.*, Jamaica currency, the principal sum of sterling money of 1428*l.* 11*s.* 5*d.*, and for interest thereon at the rate of 4*l.* per cent per annum, the sum of 2067*l.* 5*s.* 11*d.* sterling; and that there is also due to the said John Graham Campbell, for the said two several legacies of 500*l.* and 500*l.*, Jamaica currency, the principal sum in sterling money of 714*l.* 5*s.* 8½*d.*, and for interest thereon, at the rate of 4*l.* per cent per annum, the sum of 1083*l.* 12*s.* 11*d.* sterling; whereas the Master ought to have calculated and ascertained the amount or value in sterling money of the said several legacies, and the interest thereon (if the said legacies and any interest thereon shall be found payable) at the rate or premium of what is called 22½

per cent on the sterling value of bills of exchange drawn in Jamaica upon persons in England, which was the premium on such bills according to the last advices received from Jamaica respecting such premium; and that accordingly the sum of 583*l.* 1*s.* 9½*d.* is the sum which should be paid in London as the value of, and to discharge a sum of 1000*l.* Jamaica currency; whereby the sums of 1166*l.* 3*s.* 7*d.* and 1688*l.* 10*s.* 6*d.*, 583*l.* 1*s.* 9½*d.* and 844*l.* 5*s.* 3*d.* only, and not the above-mentioned sums of 1428*l.* 11*s.* 5*d.*, 2067*l.* 5*s.* 11*d.*, 714*l.* 5*s.* 8½*d.* and 1033*l.* 12*s.* 11*d.*, would be due in respect of the principal and interest of the said legacies.

The said cause of *Campbell v. Graham* came on to be heard, on further directions, and on the said exceptions, before the Master of the Rolls, who on the 8th March, 1830, overruled all the exceptions but the fourth; and declared, that the amount of the two several legacies of 1000*l.* and 1000*l.*, Jamaica currency, in the Master's report certified to be due to * the appellant John Graham Campbell, as administrator of John Campbell, deceased, was to be considered as giving to the legatee a right of retainer as on the 1st day of December, 1791, being the end of one year after the death of the said William Graham the testator, to the amount of the said two legacies, out of the debt due by the said John Campbell, deceased, to the said testator William Graham, upon the said bonds on which the said judgments were obtained, and to be considered as applied, first, in payment of the interest, and the remainder (if any) in payment of principal of the said debt; and that the account between the parties to the said suit was to be computed upon the principle of such retainer; and that it should be referred back to the said Master to inquire what was due upon the said judgments on the 2d day of June, 1794, when they were obtained, having regard to the declaration thereinbefore contained as to the right of retainer in respect of the said two legacies of 1000*l.* and 1000*l.*, Jamaica currency; and that the said Master was to compute interest at the rate of 5*l.* per cent per annum, on what he should so find to be due on the said 2d day of June, 1794, upon the said judgments, from the said 2d day of June, 1794, until the amount due on the said

judgments, together with the costs therein mentioned, should have reached the sum of 6703*l.* 5*s.* sterling, being the amount of the penalties of the said bonds and of the said costs mentioned in the said judgments; and that the said Master was to compute subsequent interest at the rate of 4*l.* per cent per annum on the two legacies of 500*l.* and 500*l.*, Jamaica currency, in the said report mentioned, from the time down to which he had already computed interest thereon; and

* 441 that the amount which the said * Master should find to be due for principal and interest of the said two legacies of 500*l.* and 500*l.*, Jamaica currency, should be set off against the said sum of 6703*l.* 5*s.*, the amount of the penalties of the said bonds and costs as aforesaid, and the remainder of the said sum of 6703*l.* 5*s.*, after such set-off as aforesaid, should be considered and taken as the debt due by the estate of the said John Campbell, deceased, to the estate of the said testator, William Graham, upon the said judgments, after such retainer and set-off, in satisfaction of the said four legacies of 1000*l.*, 1000*l.*, 500*l.* and 500*l.*, as thereinbefore directed.

The present appellant, John Graham Campbell, appealed against this order of the 8th March, 1830, complaining of the allowance of the said fourth exception, and the directions consequential thereon. The respondent, William Graham, also appealed against it, stating that the said second and sixth exceptions ought to have been allowed; and that it ought to have been declared that there was not any thing due in respect of the said two legacies, 500*l.* and 500*l.*, or either of them, but that the same must be presumed to have been paid and satisfied, or if the same were not to be presumed to have been paid and satisfied, then that the amount or value thereof, and of the interest thereon, ought to have been calculated and ascertained at the rate of what is called 22½ per cent on the sterling value of bills of exchange drawn in Jamaica upon persons in England, which was the premium upon such bills according to the last advices received from Jamaica previous to the date of the said Master's report.

Both the said petitions of appeal came on for hearing before the Lord Chancellor in the months of July and

* 442 August, 1831, and on the 23d day of August, * 1831,
[460]

his Lordship made the following order on the two petitions: On the petition of appeal of the present appellant, it was ordered that the decretal order, dated the 8th day of March, 1830, should be affirmed: and on the petition of appeal of the respondent William Graham, it was declared, that the two legacies of 500*l.* and 500*l.* Jamaica currency, must be presumed to have been paid and satisfied, and the said order of the 8th of March, 1830, as to the said legacies of 500*l.* and 500*l.* Jamaica currency, and interest, was reversed: and it was ordered, that the sum of 1780*l.* 5*s.* 6*d.*, being the amount which was under or by virtue of the said last-mentioned order set off or deducted by the Master, by his report bearing date the 29th day of May, 1830, for principal and interest of the said last-mentioned legacies, from the debt therein appearing to be due by the estate of the said John Campbell, deceased, to the estate of the said testator William Graham, was to be considered and taken as further part of the said debt.

After this order was made, Wm. Graham died, and administration *de bonis non* of the testator was taken out by the present respondent.

Sir J. Scarlett and *Mr. Tinney*, for the appellant. — The general principle on which the Master's report is founded, and on which the decree of the Lord Chancellor proceeded, is not questioned.

[THE LORD CHANCELLOR. — The only doubt I had was not on the principle or on the law, but as to the application of the law, regard being had to the want of parties.]

The lapse of time here is not sufficient to constitute a bar to the proceeding. Two bond debts were due from John Campbell, the legatee, to the testator. The will of the testator states, that the legacies are * to be paid out of * 443 the bond debts. At the time that that will was made no bond debts existed from Campbell to the testator. The question therefore is, whether the will of the testator could be taken to apply to debts afterwards becoming due to him from Campbell. It may be said, that although no bonds

existed at the time of the will, *non constat* but that the testator might contemplate a loan and a bond, and might mean that the legacies to be given to the young ladies should be paid by Campbell. But it is highly probable that the legacies were only to be paid when the bond debts were paid. In 1791 Mr. Campbell and his sisters were in England, and had no representative in Jamaica. The principle in Courts of Equity is, that where a rule would press hardly upon a particular party, the Court ought to adopt the exception rather than the rule. That is especially the case with regard to the Statute of Limitations. If absence would be a good answer in a Court of Law, it must surely be so in a Court of Equity; and in the present case that argument of absence applies with more force, as there was no representative of James Graham in this country. Besides, there is no proof that at any time within the period when the statute is said to have constituted a bar, there were any assets of the party here. There is no doubt that the testator had considerable real estate in Scotland, but he had no personal assets in England, which is shown by the fact that the representative did not take out administration in England till 1821, and then only did so for the purpose of recovering the debt due on these bonds. These were the only assets recoverable in England, and these appellants, therefore, could not make any process available

here. The same circumstance rebuts any presumption * 444 that these legacies * have been paid, since there had been no person representing William Graham to pay them. The small consideration given for the legacy may be remarked upon. But suppose that none at all had been given, natural love and affection between parties so nearly related would have been sufficient. The nature of the debt and the circumstances of the parties must be taken into consideration here; and any one looking at them, must admit that there is greater reason to presume that the debts were satisfied, than that the legacies were. The parties evidently supposed that one debt could be set off against another. The question about the exchanges cannot be brought into this case. Both the funds are in England; both the parties are here; the accounts are to be rendered here; and the legacies

are not charged on funds in Jamaica, so that there is nothing to let in the question whether a debt due in Jamaica to be paid from English funds, is liable to be affected by the exchange between the two countries. If the Statute of Limitations is, by analogy, to be applied to this case, then what part of it is to be held applicable? Is it that which gives twenty years as the limited period in ejectments, or six years in simple contract debts? The only case where satisfaction was presumed was that of *Jones v. Tuberville* (a).

[THE LORD CHANCELLOR. — My difficulty is this. If you once admit that length of time, forty years for instance, would be a bar, by operating a presumption of payment, how can you say that twenty-seven years would not do? There are two classes of cases in which the principle of limitation has been adopted in the way pointed out in your argument.]

The question here is not as upon a simple legacy, but as upon a legacy of a * particular sort, in which a * 445 question of this kind would necessarily arise. There is no ground for the presumption of payment of these legacies, here or in Jamaica. It is not likely that these ladies should go to Jamaica to sue for a legacy of 500*l*. In *Jones v. Tuberville*, (b) the bill was filed by the second husband of the legatee, and the presumption against him was therefore very strong, so that that case cannot be made an analogy for the present. In *Pickering v. Lord Stamford* (c) there was a lapse of thirty-five years, and that was not a case of a legacy, but of the less powerful claim of the next of kin; and yet an account was decreed, and the right of the next of kin was established. That case was much stronger than the present; there many of the parties were dead; here they are alive, and can be examined. Besides the other objections to the presumption of payment, there are no receipts, nor is any pretence set up that any such were ever given.

Mr. Knight and Mr. Simpkinson, for the respondent. — The

(a) 2 Ves. Jr. 11.

(b) 2 Ves. Jr. 11.

(c) 2 Ves. Jr. 272, 581.

question as to the currency is not now under discussion. The only question is, as to the presumption of payment. There is every thing here to bar the appellant's demand. A case of a will coming into operation in 1791, and no proceedings taken under it for thirty years afterwards, is one in which, *primâ facie*, the burden lies on the claimant to deliver himself from the operation of the rule of law. Has the claimant done so in the present instance? Certainly not. The youngest of the ladies attained the age of sixteen in 1773. When the testator died in 1790, she was, therefore, at least thirty-two years old at the time of his death. It is found as a fact, that

* 446 both these ladies were born in Jamaica; and what * is still more material, they were unmarried, were *sui juris*, were domiciled in the country of the legacy, of the testator, and of the assets, at the death of the testator in 1790. The point as to the exact time when these parties left Jamaica, is permitted by them to remain in doubt. That being the case, they have no right to ask this House to make any presumption, depending on that fact, in their favour. The mere fact of the absence of the testator from a colony, and of his residence in the mother country, will not relieve the party from the effects of the Statute of Limitations, when suing in this country. There is nothing to show that he had abandoned his domicile in Jamaica; but at all events, those who now claim their legacies were then domiciled there. This case was not brought into the Court of Chancery till above thirty years after the death of the testator. One of the parties has left it in doubt whether she left Jamaica before or after the death of the testator; the other, Henrietta Campbell, was, no doubt, there after his death. That is sufficient against both of them; for, in fact, one was there, and the presumption as to the other, who has left the matter in doubt upon her evidence, must be taken strongly against her. The supposed assignment of these two ladies to the appellant was made in December, 1818, just at the very moment when it was most material for the present appellant to find a reasonable answer to the demand on the bonds then set up against him by the respondent. In point of practice, though not of law, there should be an indorsement of the consideration for

the assignment of these legacies on the back of the deed. There is no such indorsement; a fact which in itself is calculated to throw a suspicion on the case. These ladies would be barred in Jamaica from maintaining the present * claim. They are at least equally barred in England; * 447 but, if they were not, the Court of Chancery here would not allow them to proceed against the rules of an English Court of Equity, merely because they might proceed in such a case in Jamaica. This House will look at this case as an English case. How then would it stand? without the slightest pretence for being brought into a court. One excuse made for the delay is, that there was for some years no personal representative of the testator in this country. But that is not enough; for the domicile of the assets was here; and the assets being here, they ought to have applied to get some person appointed as personal representative here. It is not true that the only presumption for the respondent is that of payment; there is also the presumption of release, and of any of those other means by which rights long neglected to be claimed may be extinguished. Lord ALVANLEY said, that the powers of a Court of Equity were not to be called into activity by such negligent plaintiffs. In the case of *Smith v. Clay*, (a) Lord CAMDEN says, "A Court of Equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith, and reasonable diligence. Laches and negligence are always discountenanced; and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court." In *Chalmer v. Bradley*, (b) Sir T. PLUMER, the Master of the Rolls, said, "The principles * which * 448 have governed the Courts of Equity in applying length of time as a bar to relief, do not proceed on the ground of individual hardship or loss. Public policy requires that

(a) Amb. 645; and 3 Bro. C. C. 639, where the judgment is more fully reported.

(b) 1 Jac. & W. 63.

persons should not lie by and call for accounts at a distant period. It is not as a bar, by analogy to the statute, that the length of time operates here, but it gives a ground for presuming in favour of the length of possession. It is on this principle, that in Courts of Law Acts of Parliament, grants and releases, have frequently been presumed." In *Jones v. Tuberville*, (a) Lord Commissioner EYRE said, "It is a presumption of fact in legal proceedings before juries, that claims the most solemnly established on the face of them, will be presumed to be satisfied after a certain length of time." The same principle was afterwards adopted by the Master of the Rolls, in *Hercy v. Dinwoody*. (b) The appellants here have clearly brought themselves within this principle, and must take the consequences of it. In *Foster v. Hodgson*, (c) Lord ELDON even inclined to think that the Statute of Limitations would be a good defence by demurrer. In *Montresor v. Williams*, (d) the Court presumed strongly in favour of the payment of legacies, though the land sold was charged with the payment of those legacies, because there had not been any demand of them within a reasonable time. The same principle has been adopted by the legislature in the recent statute. (e) That statute does but embody the rules on which Courts of Equity have long acted. Every analogy of law, therefore, is against the appellant.

Sir. J. Scarlett, in reply. — There is no ground for charging laches as against the legatees in Jamaica.

* 449 * All the parties resided in England, the property had become assets in England, and it could not be sued for except here: yet here there was no personal representative, and consequently no one against whom a suit could be instituted. There is no pretence of laches, so as to warrant the Court of Equity in treating the mere lapse of time as a bar to this suit.

THE LORD CHANCELLOR. — My Lords, this case is now, by

(a) 2 Ves. Jr. 13.

(b) 2 Ves. Jr. 87.

(c) 19 Ves. 185.

(d) Roper on Legacies, by White, 792.

(e) 3 & 4 W. 4, c. 42.

the judicious course adopted by the learned counsel, disencumbered of some of the points on which it was argued in the Court below. The only point now relied on is that which was raised on the second exception, namely, whether a lapse of twenty-seven years, without claim, is sufficient for the Court to presume that the legacies have been satisfied. The important object for which I recommended the appeal has now gone by, since the recent Act has embodied the principle of treating specialty debts in the same way as legacies. I am very sorry that I have not the assistance of the Lord Chief Baron (Lord LYNTHURST) on this occasion; but I had the choice of evils, that of delaying the hearing to procure his assistance, or of alone hearing the case, without putting the parties to further delay and expense. I thought it my duty to adopt the latter alternative. I shall take time to consider the judgment.

August 12.

THE LORD CHANCELLOR. — My Lords, this was an appeal from a judgment of the Court of Chancery, delivered by myself upon three exceptions, upon all of which his Honor the Master of the Rolls had given his judgment in the Court below. (a) Upon all those three exceptions, those being three out of about seven, to the Master's report, the judgment of his Honor was * brought by appeal to the * 450 Court where I have the honour to preside. The first of the exceptions respecting the mode of taking the account and set-off, and the third of the exceptions respecting the currency in which the legacy was to be paid, came before me, and upon argument and full consideration of the case, I saw no reason, with respect to them, to differ from his Honor, and I affirmed that judgment. The second was the most material of the three objections, and upon that it was my misfortune, after the best consideration I could give to the case, to differ from his Honor; and that difference was upon the ground, not of the fact whereupon it has been judiciously rested here, but of the law in respect of the length of time, which his Honor saw no reason whatever to consider as a bar to the

(a) 1 R. & Myl. 458.

claim of the legacy. That length of time constitutes a bar in the legal and strict sense of the word I never asserted, and am not now prepared to maintain ; but that it is to be taken into account in a Court of Equity, and, above all things, that a party shall not lie by for twenty-seven years, and then come and claim a legacy which he might have obtained earlier by asking in the proper way ; that if he does, such conduct shall be imputable to him as laches, if not for blame, at least for damnification of his case ; that it shall be available to the other party, who has been greatly prejudiced by it, who has been lulled into a belief that there was no claim against him, and who having had the distribution of the fund as if none were ever to be asserted, has arranged his affairs under that belief ; that he shall have a right in equity to complain of such conduct, I cannot doubt. I hold this to be so clear as not to admit of a doubt, and not to require an argument ; and

on the facts of this case, particularly that of this claim-
 * 451 ant being an * assignee, the purchaser of a legacy, one who had purchased, I think, at the rate of about twenty per cent, who had bought a 500*l.* legacy for about 20*l.* or 25*l.*, I cannot but feel that this objection as to a bar by time and as to laches, and lying by and sleeping over his rights, arises more strongly in a case of this sort than in the ordinary case of a first legatee, the first person beneficially interested in the bequest. I hold this proposition to be too clear to admit of a doubt, or to require a reason. My Lords, when this case was brought before me, I naturally referred again to the whole of the argument, went through the authorities, tried to satisfy myself that there was some doubt of the law which I had there laid down ; and when the cause came on to be argued, the first thing I heard, not to my surprise, for I knew the great skill and judgment of the very learned counsel, but to my satisfaction certainly, was an admission that they did not quarrel with the law as laid down in the Court below, that they did not maintain any other law whereupon the judgment of the Master of the Rolls might in the first instance be rested, but they denied the application of the law to the present facts of this case, for reasons which they assign : therefore, all I had to do was to look into them, and see if I

had omitted any consideration of law in giving my judgment. I resorted to my notes, made interlocularly and for the purpose of the judgment, as is my practice, during the course of the argument; I resorted also to the printed report, but chiefly to my own notes and my recollection of the case and the authorities, and I have now the most distinct recollection that my opinion was made up, both on the facts and the law, both on principles and on their application

* to the particular case. My Lords, I do assure your * 452 Lordships that had it been otherwise, I should at once have moved your Lordships to reverse my judgment, for I think that there is no mistake so great as that of maintaining, unless most completely warranted in doing so, your own decision in the last resort; for the bare authoritative affirmation will not satisfy the profession, who are the public for this purpose, and if their opinion continues against it, the decision will have no weight whatever. But it is not so in the present case. The reflection I have given to the whole case, the admission on all hands that the law is rightly decided, that there is no doubt about that, the resting the case on the facts, my recollection that the facts had been present to my mind at the time, my refreshing my recollection, my again going through the facts of the case painfully and elaborately, and scrutinizing the application of the law (the admitted sound law) to them, has led to the result on which I am now about to ground the motion, which, without more argument, I shall submit to your Lordships, that the judgment of the Court below ought to be affirmed; but with respect to the costs, I shall not recommend your Lordships to give any costs as to the general appeal. Upon one ground I am disposed to give the costs, if there be any means of ascertaining them. I have stated to your Lordships, in the outset of my observations, that there were three exceptions decided by his Honor, and made the subject of appeal before me in the Court of Chancery; the first and the third, touching the right of set-off and touching the currency, were abandoned at the bar. The first was appealed from, and the appeal abandoned at the bar; not a word was said upon it.

* If, therefore, I have any means of separating from * 453

the rest of the case the costs attaching upon that, I shall be disposed to make that exception, and give that moderate amount of costs.

Judgment affirmed accordingly.

APPEAL

FROM THE COURT OF CHANCERY.

BRAY v. BREE.

1834.

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|---|-----------------------|
| The Rev. BIDLAKE BRAY, Clerk | <i>Appellant.</i> |
| ELIZABETH BREE (late ELIZABETH MALKIN), | } <i>Respondents.</i> |
| ROBERT SHANK ATCHESON, and JOHN TOM- | |
| LINSON | |

Power. Appointment.

By indenture of settlement, a fund was assigned to trustees upon trust for all and every the child and children of a marriage, in such shares, at such age or ages, and subject to such conditions and limitations, as the wife, in case she survived the husband, should appoint. There was one child only of the marriage, and the wife surviving the husband, appointed the fund to that child for her separate use for life, and after her decease to such persons as the child should appoint, and in default of appointment, to the child's executors or administrators. The child by her will appointed to the fund, and died. *Held*, that the power in the settlement was well exercised by the wife, and that the child's appointment by her will carried the fund to her appointee after the death of the wife.

July 7, August 14.

JOSIAH SPODE the elder, in contemplation of the marriage of his daughter, the respondent Elizabeth Bree, then Elizabeth Spode, with Broad Malkin, secured to her the sum of 8000*l.* with interest, by his bond dated the 25th of November,

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1805; and she, by indenture of the same date, being the settlement made previous to the marriage, with the consent of her said intended husband, assigned the bond to William *Spode and Josiah Spode the younger, in trust, *454 after the solemnization of the marriage, to pay the interest thereof to herself for her life for her separate use; and after her decease, in case her said intended husband should survive her, to pay the interest to him for his life; and after the decease of the survivor of them, then, as to the principal of the 8000*l*. (subject to their joint appointment in favour of the children of their marriage), in case Elizabeth Spode should happen to survive her said intended husband, but not otherwise, "in trust for all and every the child and children of the said Elizabeth Spode, by the said Broad Malkin to be begotten, in such shares and proportions, and to be paid at such age or ages, time or times, and with such benefit of survivorship or otherwise, and subject to, with and under such conditions, restrictions, and limitations over the same (to be always for the benefit of some one or more of such child or children), as the said Elizabeth Spode alone, at any time or times, by any deed or deeds, writing or writings, either with or without power of revocation, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any writing in the nature of her last will and testament, to be by her signed and published in the presence of and to be attested by the like number of witnesses, should direct, limit, or appoint;" and in default of such direction or appointment by Elizabeth Spode, in the event of her surviving her said intended husband, without having jointly with him made any appointment of the said trust fund, or as to so much of the said trust premises, whereof no complete direction or appointment should have been made by her, then "in trust for all and every the child or children of * the said Eliza- *455 beth Spode, by the said Broad Malkin to be begotten, equally to be divided amongst them, if more than one, share and share alike; and in case there should be but one such child, then in trust for such one or only child, for his and her and their portion and portions; the parts and shares thereof,

or the whole thereof, to be paid to such children or child," being a son or sons, on the attainment of the age of twenty-one years, and being a daughter or daughters, at the like age, or on marriage with such consent and approbation as therein mentioned; but no such assignment, transfer, or payment was to be made until after the death of the survivor of the said Broad Malkin and Elizabeth Spode.

The indenture further provided and declared, that in default of such direction or appointment as aforesaid, and in case any such child or children, being a son or sons, should attain the age of twenty-one, or being a daughter or daughters, should attain the age of twenty-one, or be married with such consent as before-mentioned before such age, then and from thenceforth, notwithstanding the postponing the payment of the said share or shares till after the decease of the said Broad Malkin and Elizabeth Spode, and the survivor of them, all and every the right and interest of the same son or sons so attaining the said age of twenty-one years, and of such daughter or daughters so attaining the like age, or marrying with such consent as aforesaid before such age, of, in, and to the said trust, securities, moneys, and premises, or such part thereof whereof no such direction or appointment should have been made as aforesaid, should respectively be and be considered as a vested interest in the same child or children, and should be transmissible as such to his, her, or their * 456 executors or administrators, notwithstanding * the subsequent death of such child or children in the lifetime of their said parents, or of the survivor of them.

The marriage between the respondent Elizabeth Bree and Broad Malkin was solemnized shortly after the date of the settlement. In the year 1806 the latter died, without having joined in making any appointment of the 8000*l.*, leaving a daughter, Saba Eliza Malkin, the only child of the marriage, who, in April, 1825, then in her nineteenth year, married the appellant, with the consent and approbation required by the settlement, and no further settlement was made of the 8000*l.*

By a deed poll, dated the 11th of April, 1827, and duly sealed, delivered, and attested in conformity with the above-

recited power contained in the settlement of 1805, the respondent Elizabeth Bree, then Elizabeth Malkin, appointed that the said trustees, and the trustee and trustees for the time being of the said indenture of settlement, should stand possessed of and interested in the said sum of 8000*l.* secured by the said bond, and other the securities upon which the same money, or any part thereof, should for the time being be invested (subject only to her life-interest therein), upon trust after her decease to pay, assign, and transfer the same unto such person or persons, for such interest or interests, and in such parts and shares, upon such trusts, and to and for such ends, intents, and purposes, and with and under and subject to such provisions and restrictions, or otherwise in such manner and form as the said Saba Eliza Bray should, at any time or times, and from time to time, during the life of her the said Elizabeth Bree, or after her decease, and notwithstanding her then present or any future coverture, by any deed or * deeds, or writing or writings, with or * 457 without power of revocation, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will or testament in writing, to be by her signed and published in the presence of two or more credible witnesses, direct or appoint. It is unnecessary, in the events which happened, further to recite the deed poll.

Saba Eliza Bray, by her will, dated the 3d of January, 1828, and duly signed and published as required by the last-recited power given to her by the deed poll, directed and appointed, amongst other things, that the before-mentioned trustees, and the survivors of them, their and his executors, administrators, and assigns, and the trustees and trustee for the time being of the said indenture of settlement of November, 1805, should stand possessed of the said sum of 8000*l.* secured by the said bond, and other the securities upon which the same money, or any part thereof, should for the time being be invested, from and after the decease of the said Elizabeth Bree, in trust for the absolute benefit of her dear uncle, William Hammersley, formerly William Spode (who was one of the trustees of the settlement), his executors and

administrators, and upon and for no other trust, intent, or purpose whatsoever." She appointed William Hammersley sole executor of her will, and died the 16th of May following, without altering or revoking the same, and it was afterwards duly proved by her said executor in the proper Ecclesiastical Court.

Josiah Spode the elder died in July, 1827, having by his will appointed his sons, the said William Hammersley and Josiah Spode the younger, executors, by whom the * 458 same was shortly afterwards duly proved * in the Pre-rogative Court of Canterbury. On the death of Josiah Spode the younger, the respondent John Tomlinson was appointed, in March, 1829, a trustee of the settlement of November, 1805, under a power therein contained; and William Hammersley, as surviving executor of Josiah Spode the elder, invested the 8000*l.* in the purchase of 8521*l.* 19*s.* 4*d.* three per cent consolidated bank annuities, in the names of himself and John Tomlinson, upon the trusts of the settlement of 1805.

In 1827 the appellant filed his bill in Chancery, and thereby charged that no valid appointment of the said sum of 8000*l.*, under the power contained in the said indenture of settlement of 1805, had ever been made; and that if any instrument purporting to be a valid appointment of the said sum had really been made, yet inasmuch as Saba Eliza Bray was the only child of the marriage of the said Broad and Elizabeth Malkin (now Elizabeth Bree), she was not authorized, under the trusts and powers in the said indenture, to make any appointment of the 8000*l.*, or to appoint the same so as to give it to Saba Eliza Bray for her sole and separate use, or to give to Saba Eliza Bray a power of appointing the said sum by will; and the appellant thereby further charged, that under the trusts of the said indenture of settlement, Saba Eliza Bray had, during her lifetime, and at the time of her death, a vested interest in the said sum of 8000*l.*, subject only to the interest of Elizabeth Malkin, during her life; and that the appellant having survived Saba Eliza Bray, his late wife, was entitled absolutely in right of her, upon the death of Elizabeth Malkin, to the said principal sum; and

he further charged and insisted that the 8000*l.* ought to be properly secured upon the trusts in the said indenture * of settlement of 1805, in that behalf contained, for * 459 the benefit of Elizabeth Malkin, for her life, and from and after her decease, for the absolute benefit of the appellant; and he prayed that the trusts of the said indenture of settlement might be declared and carried into effect; and that it might be declared that he was entitled, under the circumstances aforesaid, to the principal sum of 8000*l.*, upon the death of Elizabeth Malkin, and that the said sum of 8000*l.* might be secured and invested by and under the direction and decree of the Court, and that, if necessary, the said sum of 8000*l.* might be raised out of the assets of Josiah Spode the elder.

The cause came on to be heard in May, 1830, before the Vice-Chancellor, and his honor dismissed the bill. (a)

The appellant presented his petition of appeal to the House of Lords in November, 1830. The proceedings on the appeal afterwards became abated by the death of William Hammersley, one of the respondents thereto; but upon the petition of his executors and personal representatives, the Lords were pleased to order that the said appeal and proceedings might stand revived against the said Elizabeth Bree (or Malkin), and Robert Shank Atcheson, as the representatives of the said William Hammersley.

Mr. Preston and *Mr. William Russell*, for the appellant, now argued, that as the power of appointment over the 8000*l.*, given by Mrs. Malkin by her marriage settlement, was a mere power of distribution, and only to be exercised in the event of there being more than one child of the marriage, and as there never was more than one child, the exercise of * the power by Mrs. Malkin was not valid. And * 460 even should the words giving the power be considered capable of a construction which warranted an exercise of it in favour of a single object, yet Mrs. Malkin had so exercised it as to exceed the limit to which the power would be legally extended.

(a) See *Bray v. Hammersley*, 3 Sim. 513.

Sir Edward Sugden and *Mr. Knight*, for the respondents, insisted that the power of appointment vested in *Elizabeth Bree* by the settlement of 1805, was in force, and subsisting, notwithstanding the circumstance of there being one child only of her marriage with *Broad Malkin*, and such power was well exercised by the deed poll of the 11th of April, 1827: And that deed poll having been effectual, *Saba Eliza Bray* was thereunder enabled to dispose of the property by will, as she had done, in favour of *William Hammersley*, who was therefore alone entitled to the trust fund, subject to the life interest of the respondent *Elizabeth Bree*.

The cases cited on both sides are mentioned and commented on in the judgment.

August 14.

THE LORD CHANCELLOR. — My Lords, this appeal from a decision of the Vice-Chancellor raised a question of considerable nicety, although now, on a further consideration of it, I entertain very little doubt as to what your Lordship's judgment ought to be. The nature of the case, rather than any great difficulty that I experienced in making up my mind to advise your Lordships on it, has given rise to the intention I have of entering into the circumstances somewhat more at large than I otherwise might have done in a case where I saw no reason to differ from the Court below.

* 461 * Upon the marriage of *Broad Malkin* and *Elizabeth Spode*, by a settlement then made, the sum of 8000*l.*, secured by bond, was vested in trustees, subject to the joint appointment of the husband and wife among the child or children of the marriage. I need not state the terms of that power of appointment, as the question arises not upon that, but upon the several appointment of the wife, she surviving her husband; which was in exactly the same terms, word for word, as the power of appointment given to the two jointly. The fund was to be in trust for all and every the child and children of *Elizabeth Spode*, by *Broad Malkin* to be begotten, in such shares and proportions, and to be paid at such age or ages, time or times, and with such benefit of survivorship or

otherwise, and subject to such conditions, restrictions, and limitations over the same (to be always for the benefit of some one or more of such child or children), as the said Elizabeth Spode alone, by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, to be by her signed and published in the presence of and to be attested by the like number of witnesses, should direct or appoint. The settlement then goes on to provide for the case of there being neither a joint appointment by the husband and wife, nor a several appointment by her, in execution of the power; in which event it provides for the transfer of the fund of 8000*l.* to the child and children, if more than one, share and share alike, at certain ages mentioned.

Mrs. Malkin survived her husband, having but one child, Saba Eliza Malkin, and she executed the power to that daughter; she, in effect, appointed, for she appointed under certain limitations "to such *person or persons *462 as she, the said Saba Eliza Bray, at any time or times, and from time to time, during my life, or after my decease, and notwithstanding her present or future coverture, should (in manner therein mentioned) direct or appoint." So that she gave Saba, her daughter, the power of appointment; and in default of that execution of the power, she then limited the fund in a way which it is unnecessary here to state. Saba Eliza, who was married to Mr. Bray, having afterwards appointed to her uncle William Hammersley, who has departed this life since the appeal was brought, the question arises between her husband and the appointee's representatives under Saba Eliza's execution of the power; which question is, whether she took an absolute interest in the 8000*l.* under the original settlement, in which case the fund would belong to her husband, or whether she took under her mother's power of appointment. If she did not take under her mother's power of appointment, but took under the original settlement, in that case *cadet questio*. If she did take under her mother's power of appointment, the remaining question is whether she well executed that power given to

her by her mother. I have no doubt that there is a good execution of the power in that case ; but the question raised, as your Lordships may perceive, is twofold : first, whether the power under the settlement of 1805, and which Elizabeth Malkin, the mother, assumed to execute, was a power of appointing, in the event which occurred, to one child, or only a power of distribution, appointing among more than one child ; that is, whether it was a power of appointment, or whether only, in effect, a power to ascertain the shares which several individuals should respectively take. That is * 463 the principal question, and the only one * encumbered with the least doubt : on the other, that is, whether the power was well executed, I have not any doubt whatsoever.

My Lords, to these questions I will now address myself. In the first place, I am of opinion that the general intent of the parties to the settlement is clear, and that a greater frustration of their intention could hardly be imagined than such a construction of the power as would go to deprive the surviving party of the execution of that power, in an event, not at all unlikely, that there should be but one child. Can it be supposed, if any person should settle 8000*l.* on the children of a marriage, that the children are not the objects, or that the settlor gave that power to distribute among children, without giving the power to appoint to one, if only one child ? It may be said that that event is provided for by the residuary clause, if I may so call it, providing for the default of any execution ; for that, in that case, the single child would take, and if more children than one, all would take share and share alike : but then this was to come into operation only from the necessity of the case, in the event of no appointment being made. The power of appointment was meant to be something more than the mere conduit through which to carry the intent of the settlor into effect. She, the wife, surviving, was to have the power of exercising her discretion “ with such conditions, restrictions, and limitations over the same, so that it should be for the benefit of the child or children ; ” consequently I infer that it was intended to put the children, to a certain degree, as is the object of all such

grants and powers, under the control and at the discretion of the party exercising the power, that it might have an influence in preventing the children from rebelling against the * mother's proper authority ; that the fund being * 464 secured under the settlement, she should have the power, according to the children's conduct, of giving more to one than to another, and if there should be but one, of making such conditions, restrictions, and limitations as might suit that case. It is not to be supposed that any prudent person, in making a settlement, would not think of providing a power for that very case in which the mother is more likely to require the exercise of a discretion, especially supposing the case of a spoiled child, in which there would be more occasion for some power to be vested of controlling that child. The confining this power, therefore, to the event of there being more children than one, is, in my opinion, contrary to the plain and manifest intention of the settlor.

In the next place, my Lords, I hold this to be a very material circumstance in construing this instrument, that it affords in itself the means of its right construction, though I have no recollection of that having been much dwelt upon at the bar ; but I must observe, there is more to be gathered from a nice inspection of an instrument itself, than from running away to consider cases which have not always a clear application. A very learned judge, the late Mr. Justice HOLROYD, said, it was his rule never to apply a case to that before him, until he had searched into every corner of the deed, or whatever it might be, out of which the cause arose ; for he had frequently found in doing so, that there was something in the deed which destroyed that very application of a case on which the parties relied. I most fully concur in that rule, as I do in another rule of the same learned judge ; which is, when a statute is referred to, never to be satisfied with any thing except the statute itself. * The first of these * 465 rules applies to the present case : I wish your Lordships to look to the words themselves ; you will find it is material to refer to the clause which provides for a defect of execution in the event of there being no appointment. First, these remarkable words occur : the appointment " to be

always for the benefit of some *one* or more of such child or children." Now if the construction contended for by the appellant be correct—that it was a power of distributing to several, and not of giving to one—it would have been thus framed: "to be always for the benefit of such children," in the plural number, if the settlor had not had in contemplation the case of one child; but having in contemplation the case of an appointment in favour, not only of several, but of one child, the settlor says, "such appointment to be always for the benefit of some one or more of such child or children." If it had been "one or more of such children," it might have been then said, that the object was to prevent any argument being on an illusory appointment; but the wording is not so, it is "to be always for the benefit of some one or more of such child or children." Finding, as we do, that word "child," I hold it as perfectly clear that that resolves the case, and that the power of appointment was intended to be executed for the benefit of one child, there being but one child.

But, my Lords, that is not the most material argument raised upon the face of this instrument. I am aware it may be said, that though it contemplated a number of children, still its object was to give a power of appointing the fund to all or to one of those children. But there is an argument arising upon another clause, the clause providing for
* 466 the contingency * of the power not being executed:

"then in trust for all and every the child and children of the said Eliz. Spode by the said Broad Malkin to be begotten, equally to be divided amongst them, if more than one, share and share alike; and in case there shall be but one such child, then in trust for such one or only child." Now, I ask your Lordships to consider how that would be sensible, how that would be consistent with the supposition whereupon the construction contended for by the appellant rests? According to that construction the case is not provided for, in the previous part of the settlement, of there being but one child; it is a *casus omissus*; and there is only a power of appointment given in case of there being several children. What sense is there, or what consistency is there, with that

statement and that view of the subject, in saying, "I give you the power of appointing among children; but I do not give you the power of appointing at all, if there is only one;" and then adding, "but if you should fail to appoint, there being more than one, it shall go to them, share and share alike; and in case of there being but one, it shall go to that one?" That argument is totally inconsistent; for it is making the second condition perfectly superfluous and unnecessary, because the first condition was sufficient, namely, the failure of appointing among children. It is argued, that if there was but one child, then that one child, according to the construction set up by the appellant, ought to have taken the trust fund; for there could not be an execution of the power, and there being no execution of the power, that child must take the fund absolutely. I consider these clauses to furnish a very strong and decisive answer to such an argument, spelling, as we are accustomed to do, most nicely, *instruments of this nature: I have consulted one of * 467 the common-law Judges, and the instant I mentioned that circumstance, he said that put an end to the question altogether.

My Lords, the execution of the power was to be such, that, under such conditions, restrictions, and limitations over the same, it should be always for the benefit of some one or more of such child or children. It has been insisted that such restrictions and limitations over the same are not for the benefit of the child; and that these words, therefore, can only apply to the execution of the power of appointing among several children, whose various interests might be reconciled and the children benefited, by conditions and limitations being imposed on their enjoyment of the property; but that such conditions could not benefit one single appointee, to whom the greatest benefit would be, the unconditional and absolute possession of the property. But the law says otherwise, and supposes that there may be a power, with these restrictions contained in it, and that such a power may be well executed, and yet that it may be for the benefit of the child.

Having thus disposed of the question as it stands upon the face of the instrument itself, I now come to the authorities,

and I entirely accede to what has been said at the bar upon them. In *Boyle v. The Bp. of Peterborough*, (a) this question was much considered; there the property was vested in trustees, "upon trust for the husband for life, then for the wife for life, and after the decease of the survivor, for all and every the child and children of the marriage, in such shares and proportions, and in such manner and form, and to

* 468 vest at such times, as the husband and wife, or * the survivor, should by any deed, &c., direct, limit, or appoint; and in default of appointment, and as to so much as should remain unappointed, to all equally." In that case Lord THURLOW said: "The form of it is, if no appointment, and for so much as is not completely appointed, to assign to all and every the children, if more than one, payable at twenty-one; if but one, then to that one, payable at twenty-one. If it had stopped there, I must have looked upon it to be a provision at twenty-one, after the death of the mother; but it goes on by directing, that if any such child shall attain twenty-one in the life of the mother, his or her share shall be considered as a vested interest, &c. I think that must relate to unappointed shares, and the effect of that phrase is not to bind the shares to be appointed, not to say they should vest at twenty-one, because the power being during life, would itself specify when they were to vest, and they might at any period of life, without waiting for that period; for there was no limitation upon her appointment, and her children need not be twenty-one when they were appointed: therefore I think this was intended to vest an interest only in default of appointment. That brings it to the question, whether the power has not lost its opportunity of being exercised by the death of the son, or whether there is a capacity of appointing where only one child is left; and if at all, whether it must not be with reference to the clause which provides for its going in case of no appointment. The words breed the doubt. Where there are only two children, the power, by way of exercise of discretion, is totally gone by the death of one before it is exercised; and it cannot be the same power, in point of extent, as when meant to be a distribution

(a) 1 Ves. Jr., 299; S. C., 3 Bro. C. C. 243.

among several, for which it is necessary there * should * 469 be several. But this clause made it proper for her to express that she did intend her power to be executed. If there was no appointment, the consequence would be that each would be entitled to a moiety, because there was no appointment. In respect of that clause she had a power to appoint to one only; for though that is not a distribution, it is an expression that it shall go by appointment, and not transmit for want of it." The whole of that case, my Lords, in both branches, appears to me not distinguishable materially from the present, and it is perfectly certain that Lord THURLOW could not have decided that case without deciding the principle on which the decision now appealed from rests.

My Lords, it was said that *Alexander v. Alexander* (a) touched a part of this case; *Folkes v. Western* (b) also was relied upon on the part of the appellant. Much doubt has been thrown upon that case at different times; it was said there was another point in that case decided, which had been wrongly decided; but my opinion is, that *Folkes v. Western*, as far as it applies to this case, is rather against than for the purpose for which it was cited. My Lords, I rely upon the reasons I have given independently of authorities, particularly the first, and above all that part of it on which I have thought it right to go into greater detail; for these reasons it appears to me that the present judgment is right, and I shall move your Lordships that the judgment of the Court below be affirmed. I do not propose to your Lordships to give any costs in this case; it appears that the money went to the uncle of the wife, upon her death; the husband probably was advised that there was a serious * question * 470 whether he was not entitled to it; and I think, under these circumstances, your Lordships are not called upon to give costs.

Judgment affirmed, without costs.

(a) 2 Ves. Sen., 640.

(b) 9 Ves. 456.

APPEAL

FROM THE COURT OF CHANCERY IN IRELAND.

HOULDITCH *v.* MARQUESS OF DONEGALL.

1834.

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| EDWARD HOULDITCH, JOHN HOULDITCH, JAMES | } <i>Appellants.</i> |
| HOULDITCH, and FRANCIS STUBBS . . . | |
| The Most Honourable GEORGE AUGUSTUS | } <i>Respondent.</i> ¹ |
| MARQUESS OF DONEGALL | |

Foreign Judgment. Jurisdiction. Practice.

The creditors of a person resident in Ireland filed a bill in the English Court of Chancery, and obtained a decree for an account, &c., and afterwards (the property of the debtor lying chiefly in Ireland) filed a bill in the Court of Chancery there, praying to have the full benefit of the proceedings in the English suit. The Court of Chancery in Ireland dismissed such second bill as for want of jurisdiction. *Held*, that the judgment of the Court of Chancery in Ireland was erroneous, that the proceedings in the English Court of Chancery were in the nature of a foreign judgment, and were to be treated as such in Ireland, namely, as *prima facie* evidence of right in the party who had obtained the judgment.² *Held*, also, that this House could either remit the case

¹ S. C., 8 Bligh N. S., 344.

² If an action be directly on a foreign judgment or decree, the American authorities seem generally to agree that it is *prima facie* evidence of right, subject to be impeached. "The distinction has been taken," says Chancellor KENT, "since the time of Lord NOTTINGHAM, between a suit brought to enforce a foreign judgment, and a plea of a foreign judgment in bar of a fresh suit for the same cause." "In the former case of a suit to enforce a foreign judgment, the rule is, that the foreign judgment is to be received in the first instance as *prima facie* evidence of the debt, and it lies on the defendant to impeach the justice of it, or to show that it was irregularly or unduly obtained." 2 Kent, 119, 120; *Noyes v. Butler*, 6 Barb. 613; *Jordan v. Robinson*, 15 Maine, 167; *Bartlett v. Knight*, 1 Mass. 401; *Bissell v. Briggs*, 9 Mass. 462; *Hall v. Williams*, 6 Pick. 238; *Hitchcock v. Aicken*, 1 Caines, 460; *Pelton v. Platner*, 13 Ohio, 209; *Cummings v. Banks*, 2 Barb. 602; *Gleason v. Dodd*, 4 Met. 336; *Buttrick v. Allen*, 8 Mass. 273; *Bissell v. Wheelvill*,

with directions, or appoint a receiver,¹ and take such other proceedings as the Court of Chancery in Ireland might have done.

June 7, 8, 16.

THE respondent, in January, 1799, succeeded to his father's titles and honours, and became Marquess of Donegall, and

11 Cush. 277; Horton v. Critchfield, 18 Ill. 133; Benton v. Burgot, 10 Serg. & R. 240; Burnham v. Webster, 1 Wood. & M. 172; Taylor v. Barron, 30 N. H. 78; Middlesex Bank v. Butnam, 29 Maine, 19; Story Conf. Laws, §§ 603 *et seq.*, § 608. In Rankin v. Goddard, 54 Maine, 28, 33, APPLETON C. J., said: "The general doctrine of the American Courts is, that they [foreign judgments] are *primâ facie* evidence, but they may be impeached. The authorities here go to this extent, that the jurisdiction of the Court, and its power over the parties and the matters in controversy, may be inquired into; and that the judgment may be impeached for fraud." Beyond this no definite lines have been drawn. Story Conf. Laws, § 608. But in England, although considerable doubt was formerly entertained on the question whether a judgment recovered in a foreign Court is conclusive between the parties, or is subject to be reagi-tated, in an action brought thereon in the Courts of that country, the rule there may now be taken to be: that if a question has been decided by such a Court in a proceeding *in personam*, between parties properly brought before it, this will preclude an inquiry in the English Courts between the same parties into the merits of the case, upon the facts so found; for this reason, that whatever constituted a defence in the foreign Court ought to have been pleaded there. Chitty Contr. (9th Eng. ed.) 730; Castrique v. Imrie, 39 L. J. C. P. 350; 8 C. B. N. S. 1; L. R. 4 H. L. 414; Bowles v. Orr, 1 Y. & C. Exch. 464; De Cosse Brissac v. Rathbone, 6 H. & N. 301; Rankin v. Goddard, 54 Maine, 28, 33, APPLETON C. J.; Bank of Australia v. Nias, 16 Q. B. 717; Henderson v. Henderson, 6 Q. B. 288, 298; Reimers v. Druce, 23 Beav. 150; 26 L. J. Ch. 196; Ricardo v. Gracias, 12 Cl. & Fin. 368; Cammell v. Sewell, 3 H. & N. 617; 5 H. & N. 728; Simpson v. Fogo, 29 L. J. Ch. 657; 9 Jur. N. S. 403; 1 J. & H. 18; 1 H. & M. 195; Martin v. Nicolls, 3 Sim. 458; Price v. Dewhurst, 3 Sim. 279, 282; Smith v. Nicolls, 5 Bing. N. C. 208; 2 Smith Lead. Cas. (5th Am. ed.) 598 [448]; 30 L. J. Exch. 238; Monroe v. Douglas, 4 Sandf. Ch. 126. The inclination of opinion in some cases in this country, has been to follow the present English rule. See Cummings v. Banks, 2 Barb. 602; Monroe v. Douglas, 4 Sandf. Ch. 126. In Lazier v. Westcott, 26 N. Y. 146, DAVIES J. said: "We think the rule adopted in England should be adopted and adhered to here, in respect to such foreign judgments, and that the same principles and

¹ Kerr Receivers (1st Am. ed.), 124, 125.

tenant for life in possession of very large real estates in Ireland, subject to family charges, and as to part to a
 * 471 jointure rent-charge of 1000*l.*, to * Barbara, Dowager Marchioness of Donegall, since deceased.

Between the year 1790, when the respondent attained his age of twenty-one years, and the death of his father, he had incurred very heavy debts, to provide means for discharging which, was, upon succeeding to his estates, one of his first cares; and accordingly, by an indenture, dated the 20th day of April, 1799, and made between the respondent, of the first part; James Dashwood, John Agnew, William M'George, and William Lyon, of the second part; and Francis Const, and George Downing, of the third part; he demised to the parties secondly named, their executors, administrators, and assigns, all his real estates in Ireland therein particularly mentioned, being the estates of which he was tenant for life as aforesaid: To hold the same unto the said James Dashwood, John Agnew, William M'George, and William Lyon, their executors, administrators, and assigns, for a term of ninety-nine years, without impeachment of waste, if the respondent should so long live; upon trust, after providing for costs, to pay to the respondent an annual sum of 10,000*l.*, free, &c., for his support. And upon trust to permit the residue of such rents, issues, and profits to form a fund for liquidation of the respondent's debts as thereafter mentioned; and the said trustees were to investigate and allow or disallow the claims of the creditors of the respondent, and were to issue debentures for the payment of such sums as might be found due.

Debentures were issued under this deed, one of which was purchased by a Mr. Jones. On the 7th January, 1802, the representatives of Jones filed their bill in the English Court of Chancery, for the purpose of having the trusts of
 * 472 the deed carried into effect; and * in July, 1803, a decree was made in that suit, appointing a receiver.

decisions which we have made as to judgments from the Courts of other States of the Union should be applied to foreign judgments." See Story Conf. Laws, § 607; *Scott v. Pilkinton*, 2 B. & S. 11; *Barrow v. West*, 23 Pick. 270; *Norwood v. Cobb*, 20 Texas, 456.

The same parties also in 1804 filed a bill against the present respondent, in Ireland; and in April, 1807, a supplemental bill against him, he having then come within the jurisdiction of the English Court of Chancery. In July, 1807, respondent filed his answer to that bill. In February, 1808, a decree was pronounced by the Master of the Rolls in this supplemental cause, directing that the plaintiff therein should have the benefit of his original suit, &c. No further proceedings were taken in the English or Irish suit. A person named Bennis Berry was the holder of some of the debentures issued by the trustees, and these debentures came into the possession of Messrs. Houlditch; and in May, 1810, they filed a bill in the Court of Chancery in Ireland, on behalf of themselves and the other creditors of the respondent who had established their claims in the said English suit, praying, amongst other things, that the trusts of the said indenture of the 20th of April, 1799, might be fully established, and might be carried into full effect and execution; and that the other creditors of the said respondent, who had established their demands in the said cause so instituted in England, who should contribute to the expense of the said suit, might have the full benefit of the said suit, and the several proceedings therein, at the hearing of the said cause. And that an account might be taken, &c.

The respondent put in his answer to this bill in November, 1810; and insisted on the invalidity of the debenture in respect of which this particular suit was instituted, as having been granted upon a debt originating in a gambling transaction. An amended bill and answer were subsequently filed, * but no further proceedings were taken in the * 473 suit. But on the 14th November, 1818, Messrs. Houlditch filed a new bill to enforce all their securities.

The respondent appeared, and gave the same answer to this bill as to the former. On the 24th of January, 1821, the appellants filed a supplemental bill in England, to have the benefit of Jones's suit. The respondent, in May, 1821, filed his answer to the said supplemental bill, impeaching the said securities, as being grounded on gambling debts and other

illegal demands, and stating that in the year 1804 they had been admitted in the original suit without sufficient proof; and that the parties in that suit in England had proceeded in the Court of Chancery in Ireland, praying the same relief which was sought for by the aforesaid proceedings in the Court of Chancery in England; and that, considering the said proceedings in Ireland to be those which alone could be effectual, the respondent's estates being all situated there, the respondent had directed his attention principally to the Irish proceedings, and accordingly had put in an answer, and taken issue with the parties on the merits. And also, that the said Messrs. Houlditch had, in the year 1818, filed their bill in the Court of Chancery in Ireland against the respondent, for recovery of the very same securities for which they had subsequently filed the said supplemental bill in England; in which suit, in Ireland, the respondent had put in his answer upon the merits, impeaching the consideration for the securities, and had joined issue with the appellants, the said Messrs. Houlditch, which suit was then pending in Ireland; and alleged that the appellants, with the view of shutting out the merits, and procuring the benefit of the report in the

* 474 English cause made on * the 10th day of August, 1804, had filed the said supplemental bill in England. On

the 25th of November, 1823, the said supplemental cause coming on to be heard before his Honor the then Vice-Chancellor, it was decreed, that the said decree of July, 1803, the decree of February, 1808, and the account and inquiries thereby directed, and the several orders and other proceedings in the former original and supplemental suits in England, should be carried on and prosecuted by and between the parties in the then pending supplemental suit, in the like manner as the said former decrees and orders might have been prosecuted between the parties thereto, if living and carrying on the same. On the 1st July, 1825, Master WINGFIELD made his report in the English suit; and on the 18th June, 1827, an order was made on further directions in that suit. On the 15th November, 1827, the appellants filed a supplemental bill in Ireland, praying to have the benefit of

the English suit secured to them in Ireland, by the decree of the Court of Chancery there. The respondent put in his answer to the Irish supplemental bill; and on the 8th December, 1828, the bills of 1818 and 1827 were dismissed, and the appellants on the same day filed a new original bill to have the full benefit of the English proceedings. On the 6th July, 1829, the respondent put in his answer to the bill of 1828; and insisted that no creditor could have the benefit of the trusts of the deed of the 20th of April, 1799, except such as had availed themselves of the terms and provisions of it, and that the decree made in the said original cause in England was erroneous, in allowing all creditors, prior to the 20th April, 1799, indiscriminately to come in; and that, in fact, the proceedings and decrees in the said original and supplemental suits in England were altogether irregular

* and erroneous, and were obtained while the respondent was absent out of the jurisdiction; and the respondent insisted that the said decree of the 23d of July, 1803, extended the relief beyond what a Court of Equity had jurisdiction to give, in letting in all the creditors (even by simple contract) who had not performed the requisites required by the said deed; and that if the respondent had been present, or had been afforded an opportunity of contesting the claims put in in the said cause, that he could have shown most of them, particularly those of the said Bennis Berry, to have been founded on gambling and other illegal and usurious considerations; and he submitted that the course adopted, in first obtaining a decree and report behind his back in England, and then seeking to have the benefit of such proceeding, so as to shut out all discussion on the merits or nature of the original claims, was highly objectionable, and such as the Court in Ireland should not give effect to. And the respondent further stated the bill filed by the appellants, E., J., and J. Houlditch, in May, 1810, and the proceedings had thereon; and insisted that the answers to that bill were notice to the appellants, Messrs. Houlditch, of the illegality and invalidity of certain debentures, so that they had purchased the same with full notice of their being impeached.

And the respondent further insisted that the fact of the appellants, Messrs. Houlditch, having left unprosecuted two suits in Ireland, — namely, the said bill of 1810, and the bill of 1818 on the same subject-matter, in which the merits of the case were in issue, and could have been gone into, — in order to prosecute the English suit, where the question upon the merits was shut out, was a manifest proof of the fraudulent nature of their demands. And the respondent

* 476 impeached * the decree, as giving to the appellants a claim to payment to debentures as to which they had made out no title. This cause being at issue, the respondent on the 28th of April, 1830, filed his cross-bill, in the nature of a bill of discovery, putting in issue the errors and irregularities in the English proceedings, and in aid of his defence in the original cause: and the appellants, Messrs. Houlditch, put in answers thereto, before they put in a full answer: and issue having been joined, witnesses were examined, and proofs taken. Both causes were set down to be heard together, and were in hearing for several days; and on the 23d of January, 1832, Lord PLUNKETT, the Lord Chancellor of Ireland, was pleased to dismiss the cross-bill, the same having been in its nature a mere bill of discovery; and his Lordship also dismissed the appellants' original bill.

Sir E. Sugden and *Mr. Bethell* appeared for the appellants; and *Mr. Knight* and *Mr. Rolfe* for the respondent. [As the Lord Chancellor, in his judgment, enters pretty fully into the reasons on which his decision is founded, it has not been deemed necessary to insert the arguments of counsel.]

July 18.

THE LORD CHANCELLOR. — This case is of considerable importance, with a view to the general law of the country and of all parts of this empire, and with relation to proceedings in Courts of Law, and to appeals in respect of the judgments of foreign Courts. One point of law, at least, is clear, namely, that a judgment between parties in a Court is conclusive between them and between those who are privy to the suit. But it is equally clear that a judgment in a foreign

Court of Record (and in foreign countries they do * not know the distinction between Courts of record * 477 and Courts not of record) may be made the ground of proceeding in the Courts of this country ; and the great rule of all civilized countries among each other is (and the rule is equally applicable to Irish, Scotch, and colonial judgments, as to those of foreign countries), that a judgment in any one of them may be made the ground of proceeding validly and with effect in this country ; but no more. The mode of proceeding is that of an action on simple contract, an action of assumpsit. The question has been a *vexata questio* in our Courts, and numerous *dicta* have been uttered upon the point, whether a foreign judgment is only *prima facie* a ground of action, or whether it is conclusive and not traversable. The language of the opinions on one side has been so strong, that we are not warranted in calling it merely the inclination of our lawyers ; it is their decision, that in this country a foreign judgment is only *prima facie*, not conclusive evidence of a debt.¹ One argument is clear, that the difference between our Courts and their Courts is so great, that it would be a strong thing to hold that our Courts should give a conclusive force to foreign judgments, when, for aught that we know, not one of the circumstances that we call necessary may have taken place in procuring the judgment. In *Buchanan v. Rucker* (a) it was found that the judgment had been given without there having been an appearance of the party against whom that judgment was passed ; and is it to be endured that the Courts of this country should be bound by that which is not founded upon any rational principle of proceeding ? So with regard to other cases of decisions of foreign Courts ; for the principles of the * law are different in each : the law * 478 of Algiers, for instance, might otherwise be held binding in our Courts ; Algiers, where we have only a consul ; or the law of Turkey, where we have an ambassador, might be so recognised. If that were the case, the law of a foreign country might be made to have the effect of binding land in this country. In those two countries a man is allowed more

(a) 1 Camp. 63 ; 9 East, 192.

¹ See *ante*, 470, note upon this point.

than one wife. Suppose the law of that country held conclusive here, and then you might be called on to make a declaration that the son of a second marriage was the heir, though the daughter of a first marriage (both wives being still living) was in existence; which would be against our law, that does not recognise a second marriage during the existence of the first; and yet the *lex loci contractûs* would say, that such a descent was valid. I give these as instances or examples of what would be the consequences of holding that foreign sentences were in themselves valid; but they also illustrate the expediency and soundness of the view, that the judgments of foreign Courts are traversable. In *Walker v. Witter* (a) this doctrine was held; and when in *Galbraith v. Neville*, which is not reported, a *dictum* of Lord HARDWICKE's was quoted, that a judgment in the Court of Great Sessions of Wales could not prevail in this country, but might be traversed, Lord KENYON was amazed, and said that such a judgment was conclusive. Mr. Justice BULLER's judgment, however, was the other way; and so was the judgment of Lord ELLENBOROUGH, in *Tarleton v. Tarleton*, (b) with which I agree; for it was held there that it was only conclusive upon a collateral matter. Mr. Justice BAYLEY there said, (c) "How is this plaintiff to be called on to unravel these proceedings? As * 479 between * the parties to this suit, the justice of it might be again litigated; but as to a stranger it cannot." If Lord ELLENBOROUGH used the general expression there attributed to him, (d) it must have been merely from a recollection of a hasty opinion at Nisi Prius, when he said that he thought he did not sit at Nisi Prius to try a writ of error on the proceedings in the Court abroad. In fact he might have sat for such a purpose had the original parties litigated the original judgment; for I hold that such a judgment is not conclusive in all cases, and so it might have been inquired into by the Court. But for the same reason I think that the Chancellor of Ireland was wrong in this case. In *Martin v. Lucy*, the Vice-Chancellor pronounced a decree that I could not affirm; but that at least shows that it might have been

(a) Doug. 1.

(b) 4 M. & Sel. 20.

(c) 4 M. & Sel. 23.

(d) 4 M. & Sel. 22.

made a ground of proceeding, though it was not exclusive. The Chancellor of Ireland, however, excluded all consideration of the merits of the decree; so that the consequence was, that if one or two matters of it only had been impeachable he could not have set them right, though the party might have been right in nine parts out of ten of the whole. It is possible that the party was right in some of the points: he wanted a receiver appointed, and an injunction to restrain the other party, to which I am of opinion he was entitled. I agree with Lord PLUNKETT that there has not been sufficient to impeach the judgment of the Court here; and as to the rest, I am of opinion that the party applying to the Irish Court of Chancery was entitled to have its assistance. I shall not enter into reasons in support of the opinion in which we agree; I shall only state them when there is a difference of opinion. It is said that it is doubtful, if it is not altogether denied, that a * Court of Equity here can * 480 appoint a receiver of property abroad. The practice in these cases is strongly against any such doubt. It is said that the cases are not disputed cases; it seems to me that they are. *Hibbert v. Hibbert* was a disputed case; but Sir ARTHUR PIGGOTT did not resist the appointment on this ground, he put it altogether on a different ground; while in *ex parte Lindesay*, Sir ANTHONY HART, *amicus curiæ*, suggested that such was every day's practice. The same principle was expressly recognised in *Lord Cranstown v. Johnston*, (a) in Comyn's Digest, (b) and in *Lord Baltimore v. Penn.* (c) All these cases show that Courts of Equity, by acting *in personam*, may mediate affect landed property abroad; they cannot bind the land directly, but they can bind it indirectly by the person of the suitor.¹ The judgment, therefore, that I shall suggest to your Lordships is, to reverse the decree, as far as that decree dismisses the bill filed in the Court of Chancery in Ireland, praying that Court for the enforcement of a decree of the Court of Chancery here; and to declare that the Court below has jurisdiction to act on such a decree, but liable to the opening of the question which that decree brings before

(a) 3 Ves. Jr. 182.

(b) Tit. Foreclosure.

(c) 1 Ves. 444.

that Court. I shall take further time to consider whether I shall say that the decree was well founded in the Court below, or only to direct further consideration, and thus to set up the jurisdiction. If the appellant is satisfied with the decree being remitted, I shall do no more; but if he is not, I shall go further, and appoint a receiver and decree an injunction.

The decree of the 23d January, 1882, was afterwards reversed, and the appellant declared to be entitled to

* 481 * have the assistance of the Court of Chancery in Ireland for carrying into effect the order made by the Court of Chancery in England. A receiver was ordered to be appointed, and further directions were reserved to the Court of Chancery in Ireland. (a)

(a) See *Houlditch v. Donegall*, Lloyd & Gould's Cases in the Court of Chancery in Ireland, before Lord Chancellor SUGDEN, p. 82.

¹ A decree in one State cannot operate upon the title to land in another State; but having jurisdiction of the person, the Court may enforce its decree. *Davis v. Headley*, 7 C. E. Green (N. J.), 115; *Carrington v. Brents*, 1 M'Lean, 167; *Watts v. Waddle*, 1 M'Lean, 200; *Willis v. Cowper*, 2 Ohio, 124; *Henry v. Doctor*, 9 Ohio, 49; *Wood v. Warner*, 2 McCarter (N. J.), 81; *Massie v. Watts*, 6 Cranch, 148, 158; *Ward v. Arredondo*, 1 Hopk. 213; *Mead v. Merritt*, 2 Paige, 402; *Mitchell v. Bunch*, 2 Paige, 615; *Dehon v. Foster*, 4 Allen, 545; *Sutphen v. Fowler*, 9 Paige, 282; *Great Falls Manuf. Co. v. Worster*, 23 N. H. 462; *Stephenson v. Davis*, 56 Maine, 75; 2 Story Eq. Jur. §§ 734, 735; 2 Dan. Ch. Pr. (4th Am. ed.) 1031-1033.

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ATTORNEY-GENERAL v. LORD ADVOCATE.

. 1834.

Practice. Precedency of Counsel.

The Attorney-General of England has precedency over the Lord Advocate of Scotland, in all matters in which they may appear as counsel at the bar of this House.

March 29, April 3, August 9.

THE Attorney-General of England and the Lord Advocate of Scotland having been together as counsel for the same party, in the cases of *Turner v. Ballendene*, *Forbes v. Livingstone*, *Houston v. Duncan*, and other appeal cases from Scotland, a question arose between them at the bar on the right of precedency, and was partially argued on the several occasions.

The Attorney-General (Sir J. CAMPBELL), in support of his claim. — The office of Attorney-General is the first in importance under the Crown, held by any member of the bar; it, therefore, ranks above all others. There are two cases which tend to prove this rank: One occurred in 1777, when Henry Dundas was Lord Advocate, in which the petition of appeal was presented to this House, and was signed, in the first instance, by the Attorney-General, and after him by the Lord Advocate. The other was a case in which the Duke of Gordon was the appellant, and the case * was signed first by Sir John Copley, the Attorney- * 482 General, and then by Sir William Rae, the Lord Advocate. The analogy furnished by the Act of Union between the two countries decides the question. In one of the articles of that Act (a) it is stipulated, that all English peers shall take precedence of all Scotch peers of their own rank, at the time of the Union: so that the holder of an English barony,

(a) Article 23. By which it is declared, "that all peers of Scotland, and their successors to their honours and dignities, shall from and after the Union be peers of Great Britain, and have rank and precedency next and immediately after the peers of the like orders and degrees in England at the time of the Union."

created the day before the passing of the Act of Union, does take precedence of the premier Scotch baron. The same principle must be extended to this case; for the two offices, like the peerages, were in existence at that period; and supposing these law officers, being the first of their respective countries, "are of like orders and degrees," the English law officers of the Crown will take precedence of the Scotch functionaries of the same rank.

THE LORD ADVOCATE (MR. JEFFREY). — No opportunity has been afforded to be prepared with authorities to argue this question. The cases cited, however, prove nothing; the petitions of appeal might have been signed, in the order stated, by mere accident. There is no analogy to be drawn from the articles of the Act of Union with respect to the precedency of English and Scotch peers; but even if such analogy exists, it does not apply in favour of the claim now set up by the Attorney-General; for that law officer is not the first law officer of the Crown: the Advocate-General has always led him in the Ecclesiastical Courts, and in
* 483 other Courts of * England itself.

[THE LORD CHANCELLOR. — There was a very celebrated case in this House, which lasted some weeks, and in which the Attorney-General led the Advocate-General.]

That must have been matter of accommodation, and could only have been done under protest. The Attorney-General was not, until lately, the second law officer of the Crown in this country: according to Blackstone, (a) not only the Advocate-General, but the King's ancient Serjeant and the King's premier Serjeant, ranked above him.

[THE LORD CHANCELLOR. — The question was mooted some years ago, and was referred to the Crown, when, in order to settle it, a warrant (b) was issued, deciding that the Attorney-General should lead the King's ancient Serjeants.]

(a) 3 Black. Comm. 28.

(b) See 6 Taunt. 424. "Whereas our Attorney and Solicitor-General
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That order makes no mention of any precedence given him over the Advocate-General, and the practice always has been to consider the Advocate-General as entitled to lead him. The Attorney-General is not, therefore, the first law officer of the Crown in England. The Lord Advocate is the first law officer of the Crown in Scotland: he possesses, too, a degree of power which has not been *entrusted *484 to the Attorney-General; he may commit a man to prison, and in this respect exercises all the authority of a magistrate. (a) As he possesses, in Scotland, a higher degree of authority than is enjoyed by the Attorney-General in England, and as he is in Scotland the first law officer of the Crown (and these are cases of Scotch appeals), while the Attorney-General is only the second law officer of the Crown in England, the decision of this question of precedence must be in favour of the Lord Advocate of Scotland.

The Attorney-General, in reply. — The analogy drawn from the Act of Union with Scotland must decide this case. That analogy is applicable here. The Attorney-General is the first law officer of the Crown in England. The argument founded on the table of precedence in Blackstone, is in favour of the right of the Attorney-General. The King's two ancient Serjeants, and then the Advocate-General, are there all placed above him. The warrant of the Crown, the fountain of honours, changed their position entirely; it placed

now have place and audience in our Courts next after the two ancientest of our serjeants-at-law for the time being, and before our other serjeants-at-law: We, considering the weighty and important affairs in which our Attorney and Solicitor-General are employed, and on which the Attorney and Solicitor-General of us, our heirs and successors, may hereafter be employed, do hereby order and direct that at all times hereafter the Attorney and Solicitor-General of us, our heirs and successors, shall have place and audience as well before the said two ancientest of our serjeants-at-law, as also before every person who now is one of our serjeants-at-law, or hereafter shall be one of the serjeants-at-law of us, our heirs or successors." This order is dated "Carlton Palace, 14 Dec., in the 54th year of our reign."

(a) Qu. Whether this is not merely a power possessed by him as public prosecutor; a character in which he unites the functions of a magistrate and a grand jury.

the Attorney-General above each of the two ancient Serjeants; and as it effected no change in the relative rank of the two ancient Serjeants and the Advocate-General, it placed the Attorney-General, by necessary and unavoidable implication, above all three. Adopting, therefore, the argument on the other side, it is quite clear that the Attorney-General is the first law officer of the Crown in England, and, as such, is entitled to the precedence now claimed. The fact that the claim is now urged in cases of Scotch appeals makes no difference.

* 485 * THE LORD CHANCELLOR. — My Lords, in this matter, which was considered a knotty point when it was last before your Lordships, (*a*) (and it was several times mentioned, though not within the last few months), I have taken time to consider the question, and I have conferred on it with learned persons who had materials to form a sound opinion; and their and my opinion, after the best consideration I can give it, is, that there is no doubt, nor ought there ever to have been any question upon it, that the Attorney-General of England leads the Lord Advocate of Scotland in all cases, whether Scotch or English, in the House of Lords, or in any other Court in which the Lord Advocate can practise, whether in the Privy Council Court, the Court of Delegates, the House of Commons (supposing them not to be members), or in the House of Lords; they lead according to rank, first the Attorney-General, and next the Lord Advocate. I threw out the reasons which induced me to think so at various times when this matter was before your Lordships. But this by no means precludes any arrangement from being made between them, for in Scotch cases it may sometimes be convenient for the Lord Advocate to go before the Attorney-General. But an arrangement of this description cannot alter the principle. If the Lord Advocate led the Attorney-General, *quasi* Lord Advocate, it might be in respect of two things; the one as to the Court in which he practised, and the other, his own office; but it never can be owing to the

(*a*) Mr. Murray had in the mean time succeeded to the office of Lord Advocate.

nature of the case: consequently, whether it be in a Crown cause, or a cause between subject and subject, and whether it be a Scotch or an English cause, it is no matter; because parties lead, *not on account of their being *486 more conversant with the matter in hand, but through and by virtue of a grant from the Crown, the fountain of all honours; or what is equivalent to it in this instance, immemorial usage: that being the sole ground for leading, it has no reference whatever to the subject-matter of the case. Now what would follow if the Lord Advocate should lead the Attorney-General? I do not say that the Crown has not the right of giving the Lord Advocate precedence. But if the Crown had said to him, "You shall lead the Attorney-General in all Scotch cases and no others, and in all other cases the Attorney-General shall lead you," it would be a very extraordinary grant, for it would be like giving to a peer the rank of a marquis in all marriage processions, but directing the marquis to go behind the barons in all funeral processions; or that the marquis should have precedence in one coronation procession, and be behind the barons in another; which would be a most capricious grant. The Crown, however, could confer such a right, and in like manner could give precedence in processions, but it is quite clear there is at present no usage of these shifting rights; therefore, if the Lord Advocate led at all, he led in all Courts. I will put a supposed case: the Attorney-General files a bill *ex officio* in the Court of Exchequer in a revenue case, or a criminal information in the Court of King's Bench, and he there obtains a judgment, and the case is brought under review in this House by writ of error, and the Lord Advocate and Attorney-General are engaged as counsel on the same side: there is nothing to prevent the Lord Advocate or other Scotch lawyer from appearing in this Court in any cause; Mr. Dalrymple did it in *Miller v.* —; but it would be absurd to say that in such a case he *should take *487 precedence. This Court of appeal is an imperial Court, and counsel who cannot practise in the Courts below may be heard here. This House is a Court of Scotch and Irish, as well as of English appeals. It may be said, that the

Lord Advocate having precedence in a case in the Court in Scotland, it would be an absurdity if he should not have precedence in the same case on appeal to this House: but it would be a greater absurdity if he were to take precedence of the Attorney-General for England in the cases I supposed. There is no precedent to justify your Lordships to come to the conclusion that the Lord Advocate has precedence over the Attorney-General, in any case that is brought to this House. On these grounds, and as I think the question raised ought to be decided and put beyond doubt, I humbly move that his Majesty's Attorney-General for England do in all cases, in this Court, take precedence of the Lord Advocate of Scotland.

The resolution was formally moved and agreed to.

The Attorney-General for the County Palatine of Lancaster, though he would lead the King's Attorney-General in the Court of Common Pleas at Lancaster, has not precedence over any of his seniors at the bar, in any of the Courts of Westminster.

On the 25th April, 1834, another important matter of precedence was settled. By warrant from the Crown of that date, the Court of Common Pleas was opened to all the members of the bar. As a mark of the royal favour to the sergeants-at-law who were thus to lose the right of exclusive practice in that Court, the warrant directed that they should, according to the seniority existing among themselves, have rank and precedence next after John Balguy, Esq. (at that time the Junior King's counsel); a favour which in effect granted to all the then sergeants-at-law the rank of King's counsel.

* APPEAL

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FROM THE COURT OF SESSION.

WARRENDER v. WARRENDER.

1885.

The Hon. Lady ANNE WARRENDER . . . *Appellant.*The Right Hon. Sir GEORGE WARRENDER, } *Respondent.*¹
Bart. }*Marriage. Divorce. Citation. Jurisdiction.*

A Scotchman domiciled in Scotland was married in England to an Englishwoman, and by marriage contract secured to her a jointure on his Scotch estates. They went to Scotland after their marriage, and resided there a short time, when they returned to England. They afterwards agreed to a separation, and articles of agreement were executed, by which the husband secured a separate maintenance to the wife during the separation. From the time of the separation the wife resided abroad, and the husband continued to be domiciled in Scotland, where he raised an action of divorce against her, on the head of adultery, alleged to have been committed abroad after the separation. *Held*, by the House of Lords, affirming the interlocutor of the Court of Session, that the wife's legal domicile was in Scotland, where the husband's was, and that she was amenable to the jurisdiction of the Scotch Court;² that an edictal citation, with actual intimation by serving a copy of the summons personally, was a good citation; and that it is competent to the Scotch Courts to entertain a suit to dissolve a marriage contracted in England.³

May 18, 19, 21, August 27.

THIS was an appeal against an interlocutor of the Court of Session in Scotland, repelling preliminary defences taken by

¹ S. C., 9 Bligh N. S. 89.² See Story Confli. Laws, §§ 46, 186; *Green v. Green*, 11 Pick. 410; *Countess of Dalhousie v. M'Douall*, 7 Cl. & Fin. 817; *Pitt v. Pitt*, 10 Jur. N. S. 735.³ See 2 Kent, 106 *et seq.*; *Ditson v. Ditson*, 4 R. I. 87; *Thompson v. State*, 28 Ala. 12; *Harding v. Alden*, 9 Greenl. 140; *Dorsey v. Dorsey*, 7 Watts, 349; *Harrison v. Harrison*, 19 Ala. 499; *Barber v. Root*, 10

the appellant to an action of divorce raised against her there, in September, 1833, at the instance of the respondent. The

main question, now for the first (*a*) time submitted for * 489 adjudication to * this House, was, whether the Scotch Courts have jurisdiction to entertain suits for dissolving marriages contracted and solemnized in England, according to the law of England.

The respondent, in the case prepared on his behalf in the Court of Session, and afterwards presented to this House for the purposes of the appeal, stated, among other things, that he was born in Scotland, of Scotch parents; succeeded to the family estates in the county of East Lothian, and acquired, by purchase in other counties of Scotland, landed property of considerable extent and value; that on succeeding to the estate of Bruntsfield, near Edinburgh, in 1820, he fitted up the mansion-house there as his principal place of residence, and actually resided there from that period; that in early life he obtained a commission in the Berwickshire militia, and was still lieutenant-colonel of that regiment. In 1807 he was returned to Parliament for the Haddington district of burghs; afterwards was elected member for an English borough, and during his attendance on his parliamentary duties, for the first five years, he lived in temporary lodgings or in hotels in London, having then no house or establishment in any part of England. In 1812, being appointed a member of the Board of Admiralty, he took possession of a house assigned to him in right of that appointment, and continued to occupy it until April of the year 1822; but in every year during that period he returned to Scotland, whenever his official duties permitted his absence from London. In October, 1810, while the respondent was residing in lodgings in London, he was married, according to the laws of England and the rites of the Church of England, to the Hon. Anne

(*a*) The same question was submitted in *Tovey v. Lindsey*, 1 Dow, 117, but was not decided.

Mass. 265; *Green v. Green*, 11 Pick. 410; *Shaw v. Gould*, L. R. 3 H. L. 55; *Dolphin v. Robins*, 7 H. L. Cas. 390; *In re Wilson's Trusts*, L. R. 1 Eq. 247; *Story Conf. Laws*, §§ 205, 226 *a*, *et seq.*; *Bishop Mar. & Div.* §§ 724, 729, 750.

Boscawen (the appellant), daughter of George Evelyn, Viscount * Falmouth, then deceased, with the * 490 consent of her guardians, she being only eighteen years of age: That previous to and in contemplation of the marriage, a settlement in the English form, to which the appellant's guardians were parties, was duly made and executed, securing the interest of her fortune to herself for life; and also an ante-nuptial contract of marriage, in the Scotch form, was executed at the same time, by which it was provided that the appellant should be secured in a jointure of 1000*l.* a year, partly over the respondent's heritable estates of Lochend, and partly over his lands at Goodspeed, both situated in the county of Haddington; and in virtue of the precept of sasine contained in that contract, the appellant was afterwards duly infeft in those lands: That immediately after the marriage, the respondent, accompanied by the appellant, returned to Scotland, and they resided together on his paternal estates there for the greater part of the two years next following; the respondent being obliged by the duties of his office in 1812 and thenceforwards, to reside more constantly in London, where the appellant also resided with him.

The respondent further stated, that in the year 1814, and subsequently, differences sprung up between him and the appellant; and that in 1819, at the solicitation of herself and her relations, he reluctantly consented to a separation. The articles of agreement entered into on that occasion, dated the 1st of January, 1819, and made between the respondent of the first part, the appellant of the second part, and her brothers, Viscount Falmouth and the Hon. and Rev John Evelyn Boscawen, of the third part, recited, that "Whereas, circumstances have arisen which have induced the said Sir George Warrender * and Dame Anne, his wife, to * 491 agree to live separate and apart from each other henceforth, until these presents shall be annulled as hereinafter mentioned," &c.; and, after securing to the appellant a certain annual income, to be paid by the respondent to her trustees, at such periods and in such manner as therein mentioned, for her separate maintenance during the separation, they contained the following clauses: "That if the said Sir

George Warrender shall in any one year be obliged to pay and shall pay any debt or debts of the said Dame Anne Warrender hereafter contracted, to the amount in the whole of upwards of 1010*l*. (the annual sum secured for her separate maintenance), then and thenceforth the covenants of the said Sir George Warrender, hereinbefore contained, shall cease and be void ;” and again, “That if the said Sir George Warrender and Dame Anne his wife shall jointly be desirous of annulling these presents, and the agreements and provisions therein contained, and shall signify such desire in writing indorsed on these presents, or on a duplicate thereof (such writing to be under their joint hands and attested by two credible witnesses), then and from thenceforth these presents, and every article, matter, and thing herein contained, shall cease, determine, and be null and void, any thing hereinbefore contained to the contrary notwithstanding.” On the 6th of February, 1819, the respondent addressed the following letter to the appellant’s brothers, the trustees of the articles : —

“ My Lord and Sir, — Although I have objected to have any clauses inserted in the articles of separation between Lady Warrender and myself, which should contain a permission from me to her to go and reside where she pleases, or which should preclude me from suing her in the Ecclesiastical Court for restitution of conjugal rights, I hereby
 * 492 * pledge myself that Lady Warrender shall be at liberty, during our separation, to go and reside where she pleases, and that I will not institute any suit against her for the purpose mentioned. I am, &c.,

“ G. WARRENDER.”

The respondent in his case further stated, that he and the appellant had lived separate ever since the date of the said recited articles ; he continuing to reside sometimes in Scotland, sometimes in London, as required by his official situation and parliamentary duties ; but that the appellant went to the continent, and, except one short visit to England in 1821, she had ever since resided abroad, in France, Switzerland, or

Italy : that circumstances having lately come to the knowledge of the respondent, which led him to distrust the appellant's conjugal fidelity, he, upon an investigation directed by him, satisfied himself that she had, in 1822, formed an improper intimacy with one Luigi Rabitti, a music-master, and had been guilty of adultery with him in that year, and kept up an adulterous intercourse with him through the years 1822, 1823, 1824, 1825, 1826, 1827, and 1828, in Paris, Dieppe, and Versailles, all in the kingdom of France ; whereupon the respondent instituted his suit praying for " a decree, finding and declaring the appellant guilty of adultery, and divorcing and separating her from his fellowship and company ; and also finding and declaring the appellant to have forfeited the rights and privileges of a lawful wife ; and that the respondent is entitled to marry any person he pleases, sicklike and in the same manner as if he had never been married, or the appellant were naturally dead ; conform to the law and practice of Scotland."

The respondent's summons of divorce, concluding in these terms, was executed against the appellant * edict- * 493 ically as forth of Scotland, (a) and a copy thereof was served personally on her at her residence at Versailles.

The appellant appeared to process, and denying that she had been guilty of conjugal infidelity, she took three preliminary defences to the action : First, that she was not subject to the jurisdiction of the Court, being English by birth, parentage, and connection, and never having been in Scotland since the date of the contract of separation ; nor had she any Scotch property, except that part of her eventual matrimonial provision was secured over the respondent's Scotch estate : her plea was, that she was not within the jurisdiction of the Court of Session, even although it were to be assumed or admitted that at the date of the marriage the respondent was and had ever since been a domiciled Scotchman : the contract of separation, which was fully carried into effect for fourteen

(a) An edictal citation is given to defenders out of Scotland, by proclamation at the Market-cross of Edinburgh, and pier and shore of Leith, Act of Sederunt, 14th December, 1805, § 1 ; and see Ersk. B. 1, tit. 2, § 18.

years, excluded the application of the Scotch legal fiction, that the domicile of the husband is necessarily the domicile of the wife. Secondly, though the appellant should be held amenable to the Court, on the ground of the husband's domicile being in Scotland, and his domicile being the wife's, still she had not been properly cited even in that view: she had only been cited as "forth of Scotland;" whereas, if jurisdiction over her be claimed on any presumption that she was living with the husband in that country, she ought, besides receiving personal intimation, to have been cited as at his residence, or somewhere else in Scotland. Thirdly, that the appellant being a domiciled Englishwoman at the time
 * 494 of her marriage,* and having been married in England according to the rites of the English church and to the English law, her marriage could be dissolved only by parliament; at all events it could not be dissolved by a Scotch Court, when all the alleged acts of conjugal infidelity were stated to have been committed in foreign countries. The appellant, in conclusion, insisted, that the marriage being an English marriage, and the respondent himself being, at the date of both the contract of marriage and contract of separation, a domiciled Englishman, all questions relative to the effect of either of those contracts should be decided according to the law of England; and by that law the marriage was indissoluble, except by Act of Parliament.

The Lord Ordinary, having heard counsel for both parties in these defences, appointed them to give in mutual cases. Before the cases were lodged, the parties being at issue as to the fact of the respondent's domicile, a joint minute was entered on the pleadings, by which the Dean of Faculty, for the respondent, stated, "That in the cases to be lodged for the parties, he consented that the preliminary defences should be argued on the assumption that the respondent was a domiciled Scotchman at the date of the marriage, and had been so ever since; provided always, that the facts stated in the summons for founding his domicile should not afterwards be disputed in discussing the preliminary defences:" and the Solicitor-General, for the appellant, answered, "that he was willing to discuss the preliminary defences on that understand-

ing, reserving the whole statements respecting the domicile, in so far as they may be of avail on the merits."

Mutual cases were subsequently lodged for the parties, and brought before the Lords of the first * division * 495 of the Court of Session, who unanimously pronounced an interlocutor, on the 14th of June, 1834, repelling the preliminary defences, and remitting to the Lord Ordinary to proceed in the cause. (a)

Lady Warrender appealed from that interlocutor.

The Attorney-General (Sir J. CAMPBELL), and *Dr. Addams*, for the appellant.—The appellant has been for the last twelve years almost constantly resident in France. Denying, in the most unqualified manner, the truth of the charges imputed to her in the summons, she is ready to meet them before the proper tribunal; but she declines pleading before what is to her a foreign Court, where, for many reasons, her defence must be conducted under comparatively great disadvantages: she has, therefore, taken preliminary objections to the action. In arguing those objections, the appellant is bound to assume, hypothetically, the truth of the statement contained in the respondent's summons, that he is a domiciled Scotchman. But it is also clear, from his summons, that, from the year 1812 until within a short period before the raising of the action, he had been almost constantly resident in England, and that the appellant was not in Scotland during the last twenty years. With the exception of two short visits to Scotland soon after the marriage, the parties resided constantly in England until the separation in 1819. On that occasion articles of agreement were executed, and a letter was written by the respondent, which, bearing express reference to the contract of separation, must be taken as part of that contract, and the obligations which it imposes on him must be considered * as effectual as if they * 496 were embodied in the agreement. By these articles, which are declared to be irrevocable except by the joint deed of the parties, and by the letter taken as part of them, the appellant was permitted to reside wherever she pleased; and

(a) 12 Shaw & D. 847.

she accordingly, in the terms of that permission, took up her residence in France, where, except a short visit to England in 1821, she has continued to reside up to the commencement of this action, and where also all the acts of infidelity alleged against her are by the summons charged to have been committed.

The appellant has been, under these circumstances, advised to take preliminary objections to the action. The first objection is, that as she was not resident within the jurisdiction of the Scotch Courts, it was incompetent to insist against her there, in any action declaratory of her personal *status*. The rule of law in such cases is, *actor sequitur forum rei*. It is true that in the case of *Brunsdon v. Wallace*, (a) where that rule may be said to have been established, there was a difference of opinion among the Judges; but that difference arose as to the effect to be given to the *forum originis*, as founding jurisdiction. All doubts upon the point were removed by the decision of this House in *Grant v. Pedie*; (b) so that, notwithstanding the seemingly different decree pronounced in the case of *Pirie v. Lunan*, (c) it may be now considered as settled law in Scotland, that even in the case of a marriage contracted in that country, the Courts there have no jurisdiction to dissolve it, unless the defender is a domiciled native, or resident within the jurisdiction for forty days before summons served.

* 497 * The rule having been laid down in the cases referred to, and the principle having been recognised in subsequent cases, that in all actions in which the wife is the complainant it is necessary, in order to found jurisdiction, that the husband be a domiciled Scotchman, or resident in Scotland for a certain time anterior to the date of citation; the question then is, whether, in administering the remedy of divorce, which, by the law of Scotland, is competent to the wife as well as to the husband, a different rule is to be applied in determining the question of jurisdiction when the husband is the complainant? That a wife may, in point of

(a) Fac. Coll. Feb. 1789; S. C., Ferg. Cons. Rep. App. 259.

(b) 1 Wils. & S. 716.

(c) Fac. Coll. March, 1796; S. C., Ferg. Cons. Rep. App. 260.

fact, be resident in a different country from her husband, is undeniable; but it may be maintained, as a proposition founded on principle and supported by legal authority, that as the *consortium vitæ* is the object of matrimony, and as it is the duty of the parties to live together, therefore, in all cases, the Court will hold the domicile of the husband to be also the domicile of the wife. That such is the general rule of law in Scotland, as in England, the appellant has no occasion to dispute: she is well aware of the legal maxim, and that full effect was given to it in the case of *French v. Pilcher*; (a) but, like every other general rule, it may be subject to exceptions, and may be qualified by the acts of the parties. It may be true that the house of her husband is the legal residence of the wife, and that, whenever it is necessary to cite the wife for her interest, a citation at the house of her husband may be a good citation. Such is the import of the case of *Chichester v. Lady Donegal*, (b), where a citation for the wife, left at the *house * 498 of her husband, with whom she was then cohabiting, was held to be a good citation. The rule obtains, too, whether the wife be, in point of fact, resident in her husband's house or not, provided there has been no separation between them, either awarded by law or consented to by the parties. Accordingly, a wife who elopes with her paramour from her husband's house in Scotland, and goes into a foreign country, is still subject to the jurisdiction of the Scotch Courts in an action of divorce, since her absence from her husband's house is, on her part, a gross breach of duty, on which she can found no plea in aid of her defence. But the case is different when the parties are separated by voluntary agreement, or by the sentence of a Judge. In such cases, the wife, in living separate from her husband, is guilty of no breach of duty: she is entitled to acquire a domicile for herself, which, as it is her actual domicile, must also be held to be her legal domicile, in questions with third parties, and above all, in questions with her husband, the party to the deed of separation.

The application of the legal fiction, which makes the hus-

(a) Fac. Coll. June, 1800; S. C., Ferg. Cons. Rep. App. 262.

(b) 1 Add. Eccle. Rep. 5-19.

band's house the legal and proper domicile of the wife, is excluded in this case by the deed of separation. That deed, which was executed in England, all the parties to which, except the respondent, were English, was irrevocable except by the consent in writing of the principal parties, and the appellant never consented to revoke it. The validity of this deed was placed beyond all doubt by the case of *Tovey v. Lindsay* (a) in this House, and was not affected by the cases of *Beeby v. Beeby*, (b) *Sullivan v. Sullivan*, (c) *Worrall v. Jacob*, (d) or the passages which * may be cited for the respondent from Roper's Law of Property of Husband and Wife. These cases show that a deed of separation does not bar a suit for divorce, nor alter the legal condition of the parties resulting from the state of marriage, *Marshall v. Rutton*; (e) but they decide no question of domicile or of jurisdiction. The deeds in those cases were revocable by either party at any time, and each of them was virtually revoked by the mere act of executing the summons of divorce. It is no part of the argument for the appellant that a separation, whether judicial or voluntary, excludes either party from the remedy of divorce for adultery: all that she insists upon is, that the trial of such action must be subject to the ordinary rules regulating jurisdiction in other matters; and that if a wife is legally resident in a foreign country, having acquired a domicile there, it is not more competent for the husband to cite her to a Scotch Court than it would be for a wife to cite to the same Court a husband legally domiciled in England. The agreement entered into by those parties, whether it be practically productive of inconvenience to the husband or not, is a conclusive answer to all his arguments founded on the fiction of law in respect to domicile. The remedy of divorce is in Scotland, as in England, a purely civil remedy, of which the injured party may or may not take advantage; a remedy which the law will infer, from certain acts of the party, to have been abandoned or forfeited. Either party, after detecting and being in a condition to prove the infidelity

(a) 1 Dow, 117.

(b) 1 Hagg. 142.

(c) 2 Add. 299.

(d) 8 Meriv. 256.

(e) Per Lord KENYON, C. J., 8 T. R. 547.

of the other, may still decline to sue for a divorce, or may continue to cohabit with the other, which amounts to condonation, and excludes the right * to obtain a di- * 500
 vorce; or there may be connivance at the offence, amounting to what is termed *lenocinium*, which is a complete bar to any action of the kind. If there are so many ways in which a husband may abandon his right to demand a divorce, how can it be maintained, with any show of reason, that a deed of separation is absolutely void, merely because the party chooses to allege that an adherence to its express terms will render the attainment of his remedy only a little more difficult, tedious, and expensive? Questions of jurisdiction may often arise in Courts of Law, on account of the foreign residence of one or other of the parties; but of the jurisdiction of Parliament to legislate upon the rights of two natural-born subjects there is no doubt. While that tribunal, and the Ecclesiastical Courts of England, are open to the respondent, he has no reason to complain of being remediless.

The question now at issue was fully considered, both in the Court of Session and in this House, in the case of *Lindsay v. Tovey*. (a) The circumstances of that case are these: Martin Eccles Lindsay, born and educated in Scotland, entered the army, and went with his regiment to Gibraltar, where, in 1781, he married Miss Tovey, an Englishwoman, and they remained there till 1784; from that time they resided together in Scotland until 1792, when they went to live at Durham. The husband soon afterwards went abroad with his regiment, his residence being regulated by the orders of his superiors. In 1802 a deed of separation was executed at Durham, by which Mrs. Lindsay accepted an annuity; the deed also declaring, that "the said M. E. Lindsay shall and will * permit and suffer the said Augusta Margaret * 501
 Tovey Lindsay to live, inhabit, and reside separate and apart from him, in such place as she shall think proper," &c. In 1804 Mr. Lindsay raised against her an action of divorce for adultery before the Commissaries of Edinburgh, Mrs. Lindsay at the time being in Durham. A preliminary objection was taken by her to the jurisdiction of the commis-

(a) Fac. Coll. June, 1807; S. C., Ferg. Cons. Rep. App. 265.

saries, but they sustained their jurisdiction. The case was brought by appeal before the Court of Session. Two questions were raised in the progress of that suit: first, whether the pursuer was a domiciled Scotchman; secondly, whether, if he was, it necessarily followed that his wife was also in the eye of the law domiciled in Scotland, she being, in fact, resident in England, in the terms of the deed of separation. To the argument for the defender, founded on that deed, it was answered, that it was by its very nature a revocable deed, and was virtually revoked by the summons of divorce. The Court of Session, adopting that view, sustained the jurisdiction of the commissaries. The interlocutor of the Court of Session being appealed from to this House, Lord ELDON said, with reference to the objection to the jurisdiction by reason of the deed of separation, "Even if the fiction or rule of law were admitted, that the forum of the wife followed that of her husband, so as to give jurisdiction to the Scotch Courts, still the effect of the deed must be to put an end to that rule or fiction till the deed was revoked. The husband himself had agreed that their forum should be different, if his wife so pleased, and then he endeavoured by this process to get rid of the effect of his own agreement." (a) Lord

* 502 REDESDALE, *concurring in the observations of Lord ELDON, said, "When it was considered that, on the principles of this decision of the Court below, any one, from any quarter, might go and establish a domicile in Scotland, and by that means, even in the face of a deed of separation, draw his wife to a Scotch forum, and proceed against her for an absolute dissolution of the marriage, the question must appear to be one of very great importance. If this were to prevail, any person had it in his power to alter the nature of his solemn engagements, &c. It could not be just, that one party should be able, at his option, to dissolve a contract by a law different from that under which it was formed, and by which the other party understood it to be governed." (b)

[LORD LYNDHURST. — These opinions of those eminent

(a) 1 Dow, 138.

(b) 1 Dow, 139.

Judges were not delivered as a judgment, and they appear to go on a misapprehension of some of the facts.]

Their opinions are not cited as a judgment; no judgment was pronounced by this House on that case, except to remit it for consideration to the Court below, and Mr. Lindsay died in the mean time. The observations of these eminent persons have been cited as being entitled to the greatest attention, and being applicable to this case, which has this additional feature, that the deed of separation was declared not to be revocable except by the joint written consent of the respondent and appellant.

The respondent has alleged, as another argument for the Scotch jurisdiction, that as the appellant was infert in real estate in Scotland in pursuance of her marriage contract, she must be held as domiciled there, where the subject of her settlement was situated.

[LORD BROUGHAM. — Do you, Sir WILLIAM FOLLETT,
* mean to support your case on that ground? * 508]

SIR WILLIAM FOLLETT. — Certainly not.]

That being the only circumstance that distinguished this from a purely English marriage, if the argument arising from it be abandoned, Lady Warrender is in the same situation in which Mrs. Lindsay was, — liable to be sued in England, but not amenable to the jurisdiction of the Scotch Courts.

The second plea to the action is, that even if, according to the legal fiction, the domicile of the husband should be held to be the domicile of the wife, still the appellant has not been duly cited to appear to this action. This is a point of practice in Scotland, best known to the practitioners there. The facts agreed upon are, that the summons was executed against the appellant edictally, as forth of Scotland; that is, by proclamation at the market-cross of Edinburgh, and pier and shore of Leith; it was also personally intimated to her, by service of a copy on her at her residence at Versailles. But if the appellant is to be held as resident at her husband's

in Scotland, it plainly follows, that the summons should be served against her at her husband's house; and it is a contradiction to cite her as forth of Scotland, when it is insisted that by fiction of law she is resident in Scotland, and when it is that fiction alone which renders this action competent. This objection to the service occurred in the case of *French v. Pilcher*, (a) and it was stated from the Bench in Scotland, that the defender should be cited not only at the market and pier and shore, but also at the house of her husband. The personal intimation, which may be required *ad majorem cautelam*, did not supply the want of a regular execution

* 504 of the summons. The respondent, while he *rested his whole case on a legal fiction, rejected the fiction altogether in the execution of the summons.

The last and main ground of objection to the suit in Scotland is, that even if the appellant were amenable to the jurisdiction of the Court there, it is incompetent for that Court to dissolve this marriage, contracted in England, with an Englishwoman, and celebrated according to the rites of the English church. This objection goes to the extent, that although the evidence of adultery were clear and conclusive, yet no Court of Law can dissolve this marriage; no Court of Law is competent to take cognizance of the conclusion of the summons. The general result of cases decided even in Scotland, such as *Edmondstone v. Edmondstone*, *Forbes v. Forbes*, and *Levett v. Levett*, (b) comes to this, that an English marriage cannot be dissolved for adultery by the Scotch Courts, unless the adultery was committed there, and the party cited be domiciled there. But the authority of *Lolley's Case* (c) is quite decisive on this question. Lolley had been married in England: his marriage was dissolved by the Commissary Court in Scotland: he thereupon contracted a second marriage in England, for which he was tried and convicted of bigamy. In that case, which is entitled in Scotland, in the action of divorce, *Sugden v. Lolley* (Sugden being the maiden name of the wife), the adultery was charged to be committed

(a) Fac. Coll. June, 1800; S. C., Ferg. Cons. Rep. App. 262.

(b) Ferg. Cons. Rep. pp. 68, 168, 209.

(c) Fac. Col. March, 1812, and Russ. & R. C. C. 237.

in Scotland, and the defender was actually residing there; two material ingredients which do not belong to the present case. If the English Judges did not intend to break in upon the jurisdiction of the Scotch Courts, Lolley was unjustly convicted of bigamy, and was illegally sentenced to transportation. But there is no question that Lolley's case was well decided, and the principle * of the decision is, * 505 that the contract of marriage, like other personal contracts, is to be construed according to the law of the country where the contract was made. In Scotland, marriages may be dissolved for adultery or desertion; in Prussia, for incompatibility of temper; in France, for any cause that either party may assign; but an English marriage cannot be dissolved, except for adultery, nor even then by any municipal tribunal in England; and that which was the principle of the decision of the twelve Judges in Lolley's case, has been adopted by one of their Lordships very recently, in *M'Carthy v. Decaiz*, (a) in the Court of Chancery, and by an eminent ecclesiastical Judge, in the case of *Beazley v. Beazley*. (b)

It is not denied that many decisions have been from time to time pronounced in the Scotch Courts, supporting the respondent's case to the fullest extent: but not one of those cases has been appealed from; for they were all collusive. The present case is the first which gives this superior tribunal an opportunity of settling the law. This House, having regard to the morals of the people, will be more inclined to restrict than extend the facility of divorces. The reasons given by the Court below for sustaining their jurisdiction are far from being satisfactory. (c)

[LORD LYNDEHURST. — The Judges in Scotland hold, that if other contracts made in England are dissoluble, so is the contract of marriage.

LORD BROUGHAM. — It cannot be contended that all the effects of a contract in one country are to be attributed to it in another country; if that were so, children born before the

(a) *Vide infra*.

(b) 8 Hagg. 689.

(c) 12 Shaw & D. 847-854.

marriage of the parents, being legitimate in Scotland, should be held legitimate in England.]

They are legitimate in England; but they are not
 * 506 heirs, and that is by reason * of the statute of Mer-
 ton. (a) It is not to be denied that the Scotch Courts
 may dissolve a Scotch marriage—a dissoluble marriage—
 either for adultery or for non-adherence; as in Prussia a
 marriage is dissoluble for incompatibility of temper. But the
 Ecclesiastical Courts of England have not jurisdiction to dis-
 solve a valid marriage for any cause. The Judges in Scot-
 land, in their reasoning in this case, evade the chief question:
 they have admitted that their decisions were broken in upon
 by Lolley's case, and the appellant insists that the decision in
 her case is inconsistent with that case. Much of the fallacy
 in this case arises from the false assumption, that this mar-
 riage was a Scotch contract: if a native of Russia came to
 this country, and married here, is that contract of marriage
 to be regulated by the laws of Russia or of England? It is
 alleged that the contract was Scotch, because Sir G. Warren-
 der says he intended to reside in Scotland. But in fact he
 did not act according to his alleged intention, for he chiefly
 resided in England; and an intention never acted upon must
 be construed as an intention never entertained. *Bruce v.*
Bruce. (b) The basis of the decision of the Scotch Court
 was, that there was nothing in the legal character of an Eng-
 lish marriage that made it incapable of being dissolved by
 the sentence of a Court of Law; whereas it is well estab-
 lished in this country, that judicial indissolubility is a legal
 quality of every English marriage. It is true that the Scotch
 Courts have dissolved many marriages on the principle which
 they assert; but in most of these cases the adultery was
 charged as having been committed in Scotland; a circum-
 stance which distinguishes this case from them.

* 507 * It is no argument to be addressed to this House, to
 say that the decisions of the Courts below have been
 many and uniform in support of their jurisdiction; in fact,

(a) *Vide infra*, *Birtwhistle v. Vardill*.

(b) 2 Bos. & Pul. 229.

that circumstance makes it imperative on this House to declare the law.

[LORD BROUGHAM. — I should like to have some authority for the assertion, that this House is not bound by a uniform course of decisions, not one of which has been appealed from.]

It is well known that effect had been given for two hundred years to general bonds of resignation, and that there had been a uniform course of decisions on them until the case of the *Bishop of London v. Ffytche*, (a) brought on writ of error to this House, reversed them all. The decisions in Scotland have not been uniform, as may be collected from the cases of *Gordon v. Pye*, *Brunsdon v. Wallace*, *Morcombe v. Maclelland*, and several others. (b) The question is now brought for adjudication to this House; it becomes necessary to settle the law; and it does not follow that, if this decision is reversed, that reversal can have any effect on a former decision which was not appealed from.

Sir William Follett and *Dr. Lushington*, for the respondent. — The question put in issue by the appellant's first plea is, whether it was competent for the respondent to institute a suit for a divorce against her in the Scotch Courts, while she was living apart from him under a deed of separation, and actually residing in a foreign country? The respondent is a Scotchman by birth, education, residence, and possession of property; his proper and unquestionable domicile is in Scotland. It is a fact, formally admitted in this case, that he is now and ever has been a domiciled Scotchman. The question then is, was Lady *Warrender domiciled in * 508 Scotland when the suit was instituted? She was, it is true, an Englishwoman up to the time of her marriage. The effect of that marriage was, that she lost her domicile of origin, and took the domicile of her husband. It is a rule of law, admitted in the municipal code of all states, that the

(a) 2 Bro. P. C. 211.

(b) Ferg. Cons. Rep. App. pp. 259, 264, 276.

forum of the husband is the forum of the wife. By entering into the marriage contract, the wife leaves her own family, and comes under the obligation to follow the fortunes of her husband, in whom the law vests a curatorial power over her : by the marriage her separate interests merge in those of the husband ; her separate character is lost in his, and she is no longer capable of retaining the domicile which she had before the marriage, or of acquiring any other separate from that of her husband. The soundness of this principle was once questioned by the Commissary Court in Scotland, but was sustained by the Court of Session on appeal. *French v. Pilcher*. (a) The principle has been followed ever since, not only in Scotland, but also in the Consistorial Courts of England. *Chichester v. Marchioness of Donegal*. (b) Although the question of domicile was not the point at issue in that case, yet the Judge observed, " Was not the Consistory Court of London the legal jurisdiction, notwithstanding her (the defendant's) actual residence, during a certain period, in Ireland? A party may have two domiciles, the one actual and the other legal ; and, *prima facie* at least, the husband's actual and the wife's legal domicile are one, wheresoever the wife may be personally resident. It is admitted that the husband's domicile is within the diocese of London." The

civil law concurs with the law of England and of
 * 509 Scotland * in holding, that the domicile of a married woman depends not on the place of her own residence, but on the domicile of her husband. (c)

The general rule is strengthened in this case by the peculiar consideration, that the husband being a domiciled Scotchman at the time of the marriage, having neither residence nor property in England, and also the wife's fortune as well as the other family provisions being secured on his Scotch estates, the marriage must be taken to be a Scotch contract, although it was had and solemnized in England. It is clear, from these circumstances, that both the parties had a view to Scotland when they entered into the contract. Huber thus

(a) *Ubi supra*, p. 497.

(b) 1 Add. Eccl. Rep. 5-19.

(c) Cod. Lib. 10, t. 39, § 9; Voet ad Pand. Lib. 28, t. 2, § 40; Lib. 5, t. 1, § 101; Stair's Inst. B. 1, tit. 4, § 9; Loth. Consist. Law, p. 136.

lays down the law: "Non ita precise respiciendus est locus in quo contractus initus est, &c. Contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit. Proinde et locus matrimonii contracti non tam is est ubi contractus nuptialis initus est quam in quo contrahentes matrimonium exercere voluerunt." (a) Lord MANSFIELD also, in *Bland v. Robinson*, (b) said, "The general rule established, *ex comitate et jure gentium*, is, that the place where the contract is made, and not where the action is brought, is to be considered in the expounding and enforcing the contract. But this rule admits of an exception, where the parties at the time of making the contract had a view to a different country." It is impossible to deny that the marriage of these parties was entered into *intuitu* of a Scotch domicile; and it must, therefore, be considered as a Scotch contract; * and * 510 consequently the appellant must be held, in respect of her husband's admitted domicile, to be amenable to the jurisdiction of the Scotch Courts. If the cases of *Brunsdon v. Wallace*, *Pirie v. Lunan*, and *Sharpe v. Orde*, cited for the appellant, have any bearing on this point, they will be found to sustain the respondent's case.

But Lady Warrender, though she admits the general rule that the actual domicile of the husband is the forum of the wife, still insists that her case is an exception, inasmuch as by the deed of separation she had her husband's permission to live apart from him and to choose her own domicile, of which permission she availed herself; and for this position she relies on the observations of Lords ELDON and REDESDALE in *Tovey v. Lindsay*. (c) The respondent answers, that she had not capacity to acquire a separate domicile independent of his; there was no covenant in the deed of separation binding him to permit her to live where she pleased, or restraining him from suing her for conjugal rights. His letter bound him in honour not to interfere with her choice of residence during the separation, but it was not intended to dissolve the matrimonial engagement, and release her from all liability to answer in the forum of the husband. The letter was not

(a) De Conflictu. Legum. § 10.

(b) 1 Sir Wm. Bl. 258.

(c) 1 Dow, 117.

under seal; was not part of the deed, and is not better than waste paper as affecting process or jurisdiction. Even if it had been incorporated in the deed, it would not have any effect, as the respondent might put an end to the deed at any time, even by the summons of divorce. The principle of the law of Scotland, deduced from the cases decided

* 511 there, is, that all voluntary separations are * revocable, although they bear to be irrevocable *ex facie* of the deeds, except where the separation has proceeded *propter sævitiam* of the husband, or is sanctioned by judicial authority. The marriage being the radical and the original contract, and separation being contrary to the implied inherent condition and to the duties of the married state, the law allows either party to revoke expressly, at any time, a contract of separation; and such contract is void by the fact of the parties again living together, or by either suing the other for restitution of conjugal rights, or for divorce; *Fletcher v. Fletcher*, (a) *Bateman v. Ross*. (b) So also by the law of the Ecclesiastical Courts of England, the relation of husband and wife must, notwithstanding deeds of separation, continue complete until it is dissolved by decree *à mensa et thoro*, or *à vinculo*; *Mortimer v. Mortimer*, (c) *King v. Sansom*, (d) *Beeby v. Beeby*, (e) *Sullivan v. Sullivan*. (g) In this last case Sir JOHN NICHOLL says, "These Courts have so repeatedly said that such deeds of separation are no bars either to suits for conjugal rights or to charges of adultery, that it would be superfluous to combat this argument" (that a deed of separation was a bar to the husband's prayer for a divorce). "I see no more in this deed than the ordinary class of provisions for enforcing, as far as it may be, the continuance, and preventing the termination, of the separate state, in which the parties covenant to live, by means of a suit for restitution brought by either, which nearly in all cases find their way into deeds of this nature, though nugatory as to any

* 512 binding effect * on the parties." Neither do the Courts of Equity give effect to deeds of separation, further

(a) 2 Cox, 99.

(b) 1 Dow, 235.

(c) 2 Hagg. 318.

(d) 3 Add. 277.

(e) 1 Hagg. 142.

(g) 2 Hagg. 239; S. C., 2 Add. 299-303.

than to enforce, reluctantly, during the separation, the payments stipulated by the husband to the wife's trustee, whose covenant to indemnify the husband against her debts is held to be a sufficiently valuable consideration; *Wilkes v. Wilkes*, (a) *Legard v. Johnson*, (b) *Worrall v. Jacob*, (c) *St. John v. St. John*. (d) Mr. Roper, in his Treatise of the Law of Property of Husband and Wife, refers to other cases, and deduces from them this general conclusion, that Courts of Equity will not infringe on the jurisdiction of the Ecclesiastical Courts, by enforcing the performance of a mere personal contract entered into between husband and wife to live apart from each other. (e) It has also been held by the Courts of Common Law, that those deeds do not affect the rights or relation of the parties, and that husband and wife cannot by any private agreement alter the character and condition which by law results from the state of marriage, while it subsists. *Marshall v. Rutton*, (g) *Beard v. Webb*. (h) The law, as thus established in all the Courts of England as well as in Scotland, is not, in the least, affected by the case of *Tovey v. Lindsay*, (i) which differed from this case in the very material circumstance, that Major Lindsay was not held to be a domiciled Scotchman at the date of the deed of separation, or when he sued for the divorce. Lord ELDON having a doubt upon that point, being inclined to think his domicile was at Durham, and being also *impressed * 513 with the circumstance that the then recent decision of the English Judges in *Lolley's* case had not been brought before the view of the Judges of the Court of Session, recommended a remit, for the purpose of reconsideration, but there was no final decision ever afterwards pronounced here or in Scotland; so that the case so much relied upon by the appellant does not affect this case one way or the other. It would be great injustice to Lord ELDON to say, that if Major Lindsay had his domicile in Scotland, his Lordship could entertain any doubt that the Courts there had jurisdiction, in the face

(a) 2 Dick. 791.

(b) 3 Ves., Jur. 352.

(c) 3 Meriv. 256.

(d) 11 Ves. 526.

(e) 2 Roper, 265-287.

(g) 8 T. R. 546.

(h) 2 Bos. & Pul. 93-107.

(i) 1 Dow. 117.

of *Lauder v. Vanghent*, (a) *M'Donald v. Fritz*, (b) and numerous other cases which have never been impugned. In the cases of *Brunsdon v. Wallace*, (c) and *Morcombe v. Maclelland*, (d) the actions were dismissed on the ground that the defenders (the husbands) had not domicile in Scotland; the attempts made in both cases to found jurisdiction on domicile *ratione originis*, failed. In the present case it is a fact admitted, that the respondent had actual domicile in Scotland, both at the date of the marriage and of the commencement of the action.

The second plea of the appellant is to the manner of the citation; she insists, that if her domicile be held to be at the dwelling-house of the respondent, then she ought not to have been cited edictally, as forth of Scotland, but the citation should have been left for her at the respondent's dwelling-house. But it is the practice in Scotland to cite a party edictally, if he or she be absent from the country

* 514 above forty * days. The appellant having been absent for that and a longer period, she was properly cited edictally; and, for the purpose of giving her actual notice of the suit, and as a measure of precaution, the summons was served personally on her, at her temporary residence in France. By the Scotch Judicature Act (e) it is declared, "That where a person, not having a dwelling-house in Scotland, occupied by his family or servants, shall have left his usual place of residence, and have been absent forty days without having left notice where he is to be found, within Scotland, he shall be held to be absent from Scotland, and be cited according to the forms prescribed." And by the Act of Sederunt (14th of December, 1805, §. 1), "It shall in time coming be held, that a person after forty days' absence from his usual place of residence, is forth of the kingdom of Scotland; and the citation, after that period, must be at the market-cross of Edinburgh, and pier and shore of Leith," &c.

(a) Fac. Coll. 27th February, 1692; S. C., Ferg. Rep. App. 250.

(b) Fac. Coll. 26th March, 1813; S. C., Ferg. Rep. App. 273.

(c) Fac. Coll. 9th February, 1789; S. C., Ferg. Rep. App. 259.

(d) Fac. Coll. 27th June, 1801; S. C., Ferg. Rep. App. 264.

(e) 6 Geo. 4, c. 120, § 53.

There can be no doubt that in this case edictal citation, accompanied with personal notice, was the proper course to be observed.

The third plea and ground of appeal, is the alleged indissolubility of this marriage by the Courts of Scotland. The respondent conceiving that so much of this plea as was not contained in the first preliminary defence, was involved in the merits of the action, which the judgment of the Court below did not at all touch; and being also advised that by the 6 Geo. 4, c. 120, § 5, any appeal against the interlocutory judgment was incompetent; presented a petition to this House against entertaining it. The appeal Committee, to whom that petition was referred, sustained * the * 515 appeal, on the ground that the judgment of the Court below did decide the principle; that an English marriage might be dissolved by a Scotch Court. In deference to that opinion of the appeal committee, the respondent has undertaken to sustain the competence of the Court of Session to entertain the action. He is a Scotchman by birth and connections and estates; he was married in England during a transient visit to that country, without any intention then or at any time to make it his permanent abode. It is evident, from the antenuptial contract, that the marriage was entered into with a view to residence in Scotland; the rights and obligations arising out of the marriage contract were to be performed in Scotland; and although England was the place of celebration, yet it was essentially a Scotch contract, and must be regulated in all its relations and consequences by the rules of Scotch law. The question for the decision of the House is not whether indissolubility is an inherent element in a marriage contracted in England between two English parties; this House, sitting on this case as a Scotch Court of appeal, is not to consider what effect the English Courts of Law, either civil or criminal, would give to a divorce pronounced by a Scotch Court.

The argument for the appellant on this part of her case is, that the contract of marriage is to be governed by and according to the law of the country where the contract is entered into. There is a fallacy in that argu-

ment: it is true, that in all questions of *status* or personal obligation, the constitution of the contract is governed by the *lex loci contractus*; that is, the questions whether the contract was valid or void, whether the requisite forms and solemnities

for completing the contract were duly complied with,

* 516 * must be determined by the law of the country where the contract was made: but where questions arise about enforcing or expounding the contract, or about granting redress to one party for a breach of its obligations by the other, these must be decided by the law of the country which the parties had in view with reference to its fulfilment. Marriages at Gretna Green between English parties, duly performed according to the Scotch form, are valid in England; it is the law of Scotland that determines their validity or nullity, but all the obligations arising from the conjugal relation are regulated by the laws of England; so much so, that a wife so married is entitled to dower out of her husband's English estates, though not to her terce out of his property in Scotland, if he should happen to have any there. *Ilderton v. Ilderton*. (a) The *lex loci contractus* cannot prevail, unless the parties had, in entering into the contract, reference to the same place for the fulfilment of its obligations; for if the forum of the contract were to prevail against the forum of the real domicile, a contract entered into in a foreign country, during one day's visit, would be governed by the laws of that country, and not by those of the country of the parties' birth and permanent residence; which would be too absurd. In a recent case, *Anstruther v. Chalmers*, (b) in the Court of Chancery, it was held that the will of a Scotchwoman, who was domiciled in England, and who, during a visit to Scotland, executed there, in the Scotch form, a will of personal property, deposited it there, and died in England, was to be construed by the English law. All writers on the civil law lay it down as an acknowledged rule, that the import and effect of

* 517 all ordinary civil contracts * are to be determined by the law of the place of performance, to which alone the contracting parties are presumed to have reference. "Contrax-

(a) 2 H. Bl. 145.

(b) 2 Sim. 1.

isse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit" are the words of Julian in the Pandects. (a) There are numerous cases decided by the Courts in Scotland, establishing the general rule, that questions relating to the negotiation of bills of exchange are to be decided by the laws of the place of payment, and not of the place of contract. *Brown v. Crawford*, (b) *Stevenson v. Stewart*, (c) *Watson v. Renton*, (d) *Armour v. Campbell*. (e) The same rule has been adopted by the English Courts of Law, as in *Robinson v. Bland*. (g) This doctrine applies with equal force to the contract of marriage, and it is so expressly stated by Huber, (h) whose words, as also those of Lord MANSFIELD in *Robinson v. Bland*, have been already quoted. (i) This marriage, therefore, on the authority of the civilians and of the cases cited, must be dealt with as a Scotch contract, and its obligations construed and enforced by the laws of Scotland, where they were intended to be performed. There is no reason to apprehend that the affirming of the interlocutor now appealed from will produce any conflict between the jurisdiction or decisions of the Scotch and English Courts, as this case is distinguished from those of *Sugden v. Lolley*, and *Beazley v. Beazley*, by the material circumstance that in these the husband and wife were English, were domiciled in England, and it was there that all the obligations arising out of the con- * 518 tract of marriage were to be performed.

The cases of *Ryan v. Ryan*, (k) and of *M'Carthy v. De-caix*, (l) cited in behalf of the appellant, have no bearing on the question for the decision of the House. The observations attributed to a noble and learned Lord, in the latter case, were not necessary for the decision of that case, and can only have the authority of an extrajudicial dictum. The case of *Lolley* must be confined to the circumstances on which the twelve Judges adjudicated, and is not to be extended. Sub-

(a) Lib. 21, tit. *De obligationibus et actionibus*.

(b) Morr. 1587.

(c) Morr. 1518.

(d) Bell's Rep. 103.

(e) Morr. 4476.

(g) 1 Wm. Bl. 256.

(h) De Conflictu Leg. § 10.

(i) P. 509 *supra*.

(k) 2 Phil. 332.

(l) *Vide infra*.

sequently to that case, and with full knowledge of it, the Judges of the Court of Session asserted their jurisdiction over a marriage contracted in England, *Edmonstone v. Edmonstone*, (a) thereby following up a long series of uniform decisions. This House, sitting as a Scotch Court of appeal, is bound to recognize those decisions, which have never been questioned. The case of *The Bishop of London v. Efytcbe* (b) was referred to, for the purpose of showing that a judgment pronounced on the authority of decisions long acquiesced in might still be reviewed and reversed by this House. That case, indeed, was reversed in this House, by nineteen against eighteen; all the bishops on one side, against all the lawyers, except Lord THURLOW, on the other. It is better for the respondent that such a decision should be quoted against him than for him. If two foreigners, Prussians for instance (with whom incompatibility of temper is ground of divorce), met on a visit in this country, and were married here and returned to Prussia, could it be maintained that the Courts of

* 519 * Prussia have not power to dissolve that marriage for any cause whatsoever, but that the parties are to be released from the contract only by Act of the English Legislature? If two English persons, travelling in France, meet and marry there, and return to this country, could not the husband, after discovering the wife's adultery, apply to the tribunals of his domicile for such remedy as they could afford him, although the Courts of the place of the contract would afford none? The law of England does not allow any valid marriage to be dissolved *à vinculo*, by the Courts of law; but the Scotch Courts have the power to entertain those actions, and have frequently exercised it. The question here is, not what effect the divorce granted in Scotland would have in England, but it is, whether the Courts of Scotland have, by the law of Scotland, the power to divorce on proof of adultery.

Dr. Addams, in reply.—The whole of the argument for the respondent is put on the fact of his domicile being in Scotland when the action was raised. The appellant had not her residence then in Scotland, either in fact or in law.

(a) Ferg. Cons. Rep. 168.

(b) 2 Bro. P. C. 211.

It is not alleged that her actual residence was there, and the fiction of law is excluded by the deed of separation, which was not revoked when the action was commenced. It is a fallacy to say that the marriage of these parties was a Scotch contract; for the marriage was performed in England, the appellant was an Englishwoman, and the respondent was residing in England. If a Spaniard or other foreigner came to this country and married an Englishwoman here, according to the law of England, could it be said, that that was a Spanish and not an English marriage? There cannot be a doubt, * that if the interlocutor be affirmed, the Court * 520 below will proceed, on proof of adultery, to dissolve this marriage, whether it is Scotch or English. The Commissaries in Scotland were generally inclined against the assumption of this power, but they were overruled by the Judges of the Court of Session. The case of *Gordon v. Pie* (a) was the first English marriage over which the Court of Session assumed jurisdiction, by remitting that case to the Commissary Court, with instructions to proceed; but there were numerous cases previous to that, in which the jurisdiction was declined; *Brunsdon v. Wallace*, *Morcombe v. Maclelland*. — He further cited, for the purposes of his argument, *Dalrymple v. Dalrymple*, (b) and *Anstruther v. Adair*; (c) and many of the cases already referred to.

The Lords took time to consider the case.

August 27.

LORD BROUGHAM. — Sir George Warrender, a Scotch baronet, possessed of large hereditary estates in Scotland, born and educated in that country, and having there his capital mansion, where he resided the greater part of the year, except when he held office or was attending his parliamentary duties in England, intermarried in London, in 1810, with the daughter of the Viscount Falmouth, Anne Boscawen, who was born and educated in England, and never had been in Scotland previous to the marriage. After that event, she

(a) Ferg. Cons. Rep. App. 276, 357.

(b) 2 Hagg. 58.

(c) 2 My. & K. 513.

was twice there with her husband, but subsequently he resided for the most part in London, to discharge the
 * 521 duties of Lord of the Admiralty and * Commissioner of East India Affairs; offices which he held from 1812 to 1819, inclusive. In the latter year, at the end of much domestic dissension, a separation was determined upon, and an agreement executed by the parties; in which, after setting forth by way of recital only their having agreed to live separate, Sir George bound himself to allow Dame Anne Warrender a certain annuity; and it was further agreed that the agreement shall only be rescinded by common consent, and in a certain specified manner. A letter was written by Sir George, bearing equal date with the agreement, and addressed to the trustees under the marriage settlement. In this he stated that he had refused to insert any provision for her being allowed to live apart, in order that he might not be precluded from suing, if he chose, for restitution of conjugal rights, but also stating that it was not his intention ever to do so, or to interfere with or molest her in the choice of a residence. The marriage settlement had secured her a jointure upon the Scotch real estates; upon which fact it is now admitted that nothing can turn, except that it may serve the better to show the connection of the parties and the contract with Scotland.

These are the facts, and the undisputed facts of this case. I say undisputed; for the attempt occasionally made in the course of the appellant's argument, to create some doubt as to Sir George Warrender's Scotch residence and domicile, cannot be considered as persisted in with such a degree of firmness or uniformity as to require a discussion and a decision of the point, in order to clear the way for the very important legal question which arises upon these plain and undeniable statements.

* 522 * In 1834, after the parties had lived separate for fifteen years, Sir George's residence being, during the latter part of the time, almost constantly on his Scotch estates, and Lady Warrender's varying from one country to another — a few months in England, generally in France, and occasionally in Italy — Sir George brought his suit in the Court

of Session (exercising, under the recent statute, the consistorial jurisdiction formerly vested in the commissaries) for divorce, by reason of adultery alleged to have been committed by his wife. Lady Warrender took preliminary objections to the competency of the suit, under three heads: First, that the summons of divorce was not served on her at her husband's residence, so as to give her a regular citation; secondly, that the Court had no jurisdiction, inasmuch as the wife's domicile was no longer her husband's after the separation; (a) thirdly, that even if the service had been regular, and the two domiciles one and the same, and that domicile Scotland, the marriage having been contracted in England, and one of the parties being English, no sentence of a Scotch Court could dissolve the contract. To these several points I propose to address myself in their order.

The first need not detain us long. It is clear, that if the wife's domicile is not in Scotland, her being cited or not cited at the mansion is wholly immaterial; and the minor objection of irregularity merges in the exception to the jurisdiction: and if the wife's domicile was in Scotland, it must be her husband's, which, indeed, the objection supposes; and then the * argument amounts to this, that Sir George * 523 should have served himself with a notice, by way of regularly serving his wife. Surely it is unnecessary to show that such a proceeding would have been nugatory, not to say ridiculous, and that the omission of it can work nothing against the validity of the notice. Lady Warrender had, it is admitted on all hands, personal service and full notice of the proceeding against her; nor was any reliance placed upon her domicile in contemplation of law (that is, her husband's domicile), being sufficient to exclude the necessity of bringing notice, in point of fact, home to her. If the preliminary objection to the service is good for any thing, it is good to show that the pursuer might have served a notice on her whom he knew to be some hundreds of miles distant, by leaving it for her in his own house, and then have considered this as good and sufficient service, without personally notifying

(a) The order in which these two objections were pleaded and argued is here reversed.

his intended suit to her, or serving her with the summons which he had filed. We may therefore come at once to the serious and more substantial exceptions taken against the jurisdiction; the first of which arises upon the domicile, as affected by the articles of separation.

Secondly, It is admitted on all hands that, in the ordinary case, the husband's domicile is the wife's also; that, consequently, had Lady Warrender been either residing really and in fact with her husband, or been accidentally absent for any length of time, or even been by some family arrangement, without more, in the habit of never going to Scotland, which was not her native country, while he lived generally there, no question could have been raised upon the competency of the action as excluded by her non-residence. For actual residence — residence in point of fact — signifies nothing

* 524 in the case of a married woman, and * shall not, in ordinary circumstances, be set up against the presumption of law, that she resides with her husband. Had she been absent for her health, or in attendance upon a sick relation, or for economical reasons, how long soever this separation *de facto* might have lasted, her domicile could never have been changed. Nay, had the parties lived in different places, from a mutual understanding which prevailed between them, the case would still be the same. The law could take no notice of the fact, but must proceed upon its own conclusive presumption, and hold her domiciled where she ought to be, and where, in all ordinary circumstances, she would be, — with her husband.¹ Does the execution of a formal instrument, recognizing such an understanding, make any difference in the case? This is all we have here; for there is no agreement to live separate. The "letter" has indeed been imported into the agreement, and argued upon as a part of it. Now, not to mention that the instrument in which parties finally state their intentions, and mutually stipulate and bind themselves, is always to be regarded as their only contract; and that no separate or subsequent agreement is to be taken into the account, unless it contains some collateral agree-

¹ See Story Conf. Laws, §§ 46, 136; Countess of Dalhousie v. M'Douall, 7 Cl. & Fin. 817.

ment; admitting that we have a right to look at the letter at all, either as part of one transaction with the agreement, or as providing for something left unsettled in the principal instrument, and so collateral in some sort to the contract itself, it does not appear that the tenor of the letter aids the appellant's contention. For the letter sets out with expressly saying, that Sir George has refused to insert in the agreement a leave to live apart, in order to preclude all objection against his suing for restitution of conjugal rights. Is not this * sufficient to deprive the letter of all binding force in * 525 law, whatever else it may contain? In truth, the words which follow this preliminary statement amount only to an honorary pledge, in no legal view obligatory, even had they stood alone; but, taken in connection with the preceding statement, they plainly exclude all possibility of construing the letter as a legal obligation. It therefore appears impossible to consider the parties in this case as living apart under a contract of separation. The agreement, by its obvious construction, only imports an obligation upon Sir G. Warrender to pay so much a year to Lady Warrender, as long as she should live apart from him. But let us suppose it to be an ordinary deed of separation; that it contained a covenant on the husband's part to permit the wife to live apart from him, and to choose her own residence; and let us consider what difference this would make, and whether or not this would be sufficient to determine the legal presumption of domicile.

First of all, it must be admitted that, even if the execution of such a deed gave the wife a power of choosing a residence, and if that residence once chosen were to be deemed her separate domicile, still this would only give her a power; and unless she had executed the power by choosing a residence, no new domicile could be acquired by her. The domicile which she had before marriage was for ever destroyed by that change in her condition. The dissolution of the marriage by divorce, or by the husband's decease, never could remit her to her original or maiden domicile; much less could this be affected by any such deed as we are supposing; for that, by the utmost possible stretch of the supposition, could only give * her the option of taking a new domicile, other * 526

than her husband's; and until she did exercise this option her married or marital domicile would not be changed. Now there is no evidence here of Lady Warrender having ever acquired any domicile after 1819, other than the one she had before the separation, that is to say, her husband's; and this proof clearly lay upon her, for she sets up the separation to exclude the legal presumption that she is domiciled with her husband; and the separation only conveying to her a power of choosing a domicile, and the production of the articles only proving that power to have been conferred upon her, unless she goes further, and also proves the exercise of the power by acquiring a new domicile, she proves nothing. She only shows, and all the ample admissions we are, for the sake of argument, making, confess that she had obtained the power or possibility of gaining a domicile other than her husband's, but not at all that she had actually gained such separate domicile. The evidence in the cause is nothing to this purpose. It is, indeed, rather against than for the appellant's argument; it rather shows that she had done nothing like gaining a new domicile, for she was living chiefly abroad, and in different places. But there is, at any rate, no evidence in the cause of her acquiring a separate domicile, and the proof lying upon her, it follows that, for all the purposes of the present question, her husband's Scotch domicile is her own. But suppose we pass over this fundamental difficulty in her case, and which appears to me decisive of the exception with which I am now dealing, I am of opinion that there is nothing in the separation, supposing it had been ever so formal, and ever so full in its provisions, which can by

* 527 law * displace the presumption of domicile raised by the marriage, and subsisting in full force as long as the marriage endures.

A party relying on the *lex loci contractus*, in construing the import and tracing the consequences of the marriage contract, cannot well be heard to deny that the same *lex loci* must regulate the construction and the consequences of any deed of separation between the married pair. Nor do I understand the appellant as repudiating the English law as to the import of the separation in this case. Then what is the

legal value or force of this kind of agreement in our law? Absolutely none whatever—in any Court whatever—for any purpose whatever, save and except one only, — the obligation contracted by the husband with trustees to pay certain sums to the wife, the *cestui que trust*. In no other point of view is any effect given by our jurisprudence, either at law or in equity, to such a contract. No damages can be recovered for its breach—no specific performance of its articles can be decreed. No Court, civil or consistorial, can take notice of its existence. So far has the legal presumption of cohabitation been carried by the common-law Courts, that the most formal separation can only be given in mitigation of damages, and not at all as an answer to an action for criminal conversation, the ground of which is the alleged loss of comfort in the wife's society; and all the evidence that can be adduced of the fact of living apart, and all the instruments that can be produced binding the husband to suffer the separate residence of his wife—nay, even where he has for himself stipulated for her living apart, and laid her under conditions that she should never come near him—all is utterly insufficient to repel the claim which he makes for the loss of her

* society without doing any act either in court or *in pais*, to determine the separation or annul the agreement. In other words, no fact and no contract, no matter *in pais* and no deed executed, can rebut the overruling presumption of the law that the married persons live together, or, which is the same thing, that they have one residence—one domicile. In the contemplation of the common law then, they live together and have the same domicile. That the Consistorial Courts regard the matter in the same light is manifest from the strong decision given upon the 3 & 4 Geo. 4, as applicable to a case where the parties had never been near one another for ten years before it passed; yet this case was held within the provision of the statute which gives the benefit of confirmation of the marriage to all parties who have been living together at and before the passing of the Act. But we need not resort to such extreme cases, or seek support from such strong decisions. It is admitted on all hands that the Consistorial Courts never regard a separation, how formal

soever, as of any avail at all against either party, nor require any person suing for his rights under the marriage, and standing on the marriage, to do any act for annulling the separation. Either party has a clear and undenied right to pass it by entirely, and proceed, whether in bringing or in defending a suit, exactly as if the separation articles had no existence.

Thirdly, We are therefore, in every view that can be taken of the question, bound to regard Lady Warrender's domicile as identical with her husband's, and thus the case becomes divested of all special circumstances, and is that of a marriage had in England between a domiciled Scotchman and an Eng-

lishwoman, sought to be dissolved by reason of the * 529 wife's adultery, * through a suit in the Courts in Scotland, the residence or domicile of the husband being *bonâ fide* Scotch; and as the determination at which we have arrived upon the question of domicile makes the *forum originis* of the wife quite immaterial, the question is in truth the general one, whether or not a Scotch divorce can dissolve a marriage contracted by a domiciled Scotchman in England, the parties to that marriage being *bonâ fide* and not collusively for the purposes of the suit, domiciled in Scotland. The importance of this question to the parties, and, considering the constant and fortunate intercourse between the two countries, to the law which governs each, cannot be denied; at the same time it is of considerably less interest than it would have been had the domicile not been *bonâ fide* Scotch, because then the more absolute question would have been raised as to the validity of a Scotch divorce generally, to dissolve an English marriage. Possibly the decisions upon the validity of Scotch marriages generally and without regard to the fraud upon the English law, practised by the parties to them, may seem to make the distinction to which I have just adverted less material and substantial; nevertheless I think it right and convenient to make it, and to keep it in view.

The general principle is denied by no one that the *lex loci* is to be the governing rule in deciding upon the validity or invalidity of all personal contracts. This is sometimes expressed, and I take leave to say inaccurately expressed, by saying that there is a *comitas* shown by the tribunals of one

country towards the laws of the other country. Such a thing as *comitas* or courtesy may be said to exist in certain cases, as where the French Courts inquire how our law would deal with a Frenchman in similar or parallel circumstances, * and upon proof of it, so deal with an Englishman in * 530 those circumstances. This is truly a *comitas*, and can be explained upon no other ground; and I must be permitted to say, with all respect for the usage, it is not easily reconcilable to any sound reason. But when the Courts of one country consider the laws of another in which any contract has been made, or is alleged to have been made, in construing its meaning, or ascertaining its existence, they can hardly be said to act from courtesy, *ex comitate*; for it is of the essence of the subject-matter to ascertain the meaning of the parties, and that they did solemnly bind themselves; and it is clear that you must presume them to have intended what the law of the country sanctions or supposes; it is equally clear that their adopting the forms and solemnities which that law prescribes, shows their intention to bind themselves, nay more, is the only safe criterion of their having entertained such an intention. Therefore the Courts of the country where the question arises, resort to the law of the country where the contract was made, not *ex comitate*, but *ex debito justitiæ*; and in order to explicate their own jurisdiction by discovering that which they are in quest of, and which alone they are in quest of, the meaning and intent of the parties.

But whatever may be the foundation of the principle, its acceptance in all systems of jurisprudence is unquestionable. Thus a marriage, good by the laws of one country, is held good in all others where the question of its validity may arise. For the question always must be, did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than * as intending a marriage contract. The laws of each * 531 nation lay down the forms and solemnities, a compliance with which shall be deemed the only criterion of the intention to enter into the contract. If those laws annex certain disqualifications to parties circumstanced in a particu-

lar way, or if they impose certain conditions precedent on certain parties, this falls exactly within the same rule; for the presumption of law is in the one case that the parties are absolutely incapable of the consent required to make the contract, and in the other case, that they are incapable until they have complied with the conditions imposed. I shall only stop here to remark, that the English jurisprudence, while it adopts this principle in words, would not perhaps, in certain cases which may be put, be found very willing to act upon it throughout. Thus we should expect that the Spanish and Portuguese Courts would hold an English marriage avoidable between uncle and niece, or brother and sister-in-law, though solemnized under papal dispensation, because it would clearly be avoidable in this country. But I strongly incline to think that our Courts would refuse to sanction, and would avoid by sentence, a marriage between those relatives contracted in the Peninsula, under dispensation, although beyond all doubt such a marriage would there be valid by the *lex loci contractus*, and incapable of being set aside by any proceedings in that country.

But the rule extends, I apprehend, no further than to the ascertaining of the validity of the contract, and the meaning of the parties, that is, the existence of the contract and its construction. If indeed there go two things under one and the same name in different countries — if that which is called marriage is of a different nature in each — there may

* 532 be some room * for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe, that we regard it as a wholly different thing, a different *status*, from Turkish or other marriages among infidel nations, because we clearly never should recognize the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. This cannot be put upon any rational ground, except our holding the infidel marriage to be some-

thing different from the Christian, and our also holding Christian marriage to be the same everywhere. Therefore all that the Courts of one country have to determine is, whether or not the thing called marriage, that known relation of persons, that relation which those Courts are acquainted with, and know how to deal with, has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had; the relation has been constituted; and those Courts will deal with the rights of the parties under it according to the principles of the municipal law which they administer.¹

But it is said that what is called the *essence* of the contract must also be judged of according to the *lex loci*; and as this is a somewhat vague, and for its vagueness, a somewhat suspicious proposition, it is rendered more certain by adding, that dissolubility or indissolubility is of the essence of the contract. Now I take this to be really *petitio principii*. It is * putting the very question under discussion into * 533 another form of words, and giving the answer in one way. There are many other things which may just as well be reckoned of the essence as this. If it is said that the parties marrying in England must be taken all the world over to have bound themselves to live until death or an Act of Parliament "them do part;" why shall it not also be said that they have bound themselves to live together on such terms, and with such mutual personal rights and duties, as the English law recognizes and enforces? Those rights and duties are just as much of the essence as dissolubility or indissolubility; and yet all admit, all must admit, that persons married in England and settled in Scotland will be entitled only to the personal rights which the Scotch law sanctions, and will only be liable to perform the duties which the Scotch law imposes. Indeed if we are to regard the nature of the contract in this respect as defined by the *lex loci*, it is difficult to see why we may not import from Turkey into England a marriage of such a nature as that it is capable of being followed by and

¹ See Story Conf. Laws, § 114; *Wightman v. Wightman*, 4 John. Ch. 343.

subsisting with another, polygamy being there of the essence of the contract.

The fallacy of the argument, "that indissolubility is of the essence," appears plainly to be this: it confounds incidents with essence; it makes the rights under a contract, or flowing from and arising out of it, parcel of the contract; it makes the mode in which judicatures deal with those rights, and with the contract itself, part of the contract; instead of considering, as in all soundness of principle we ought, that the contract and all its incidents, and the rights of the parties to it, and the wrongs committed by them respecting it, must be

* 534 dealt with by the Courts of the * country where the parties reside, and where the contract is to be carried into execution.

But at all events this is clear, and it seems decisive of the point, that if, on some such ground as this, a marriage indissoluble by the *lex loci* is to be held indissoluble everywhere; so, conversely, a marriage dissoluble by the *lex loci* must be held everywhere dissoluble. The one proposition is in truth identical with the other. Now it would follow from hence, or rather it is the same proposition, that a marriage contracted in Scotland, where it is dissoluble by reason of adultery or of non-adherence, is dissoluble in England, and that at the suit of either party. Therefore a wife married in Scotland might sue her husband in our Courts for adultery, or for absenting himself four years, and ought to obtain a divorce *à vinculo matrimonii*. Nay, if the marriage had been solemnized in Prussia, either party might obtain a divorce on the ground of incompatibility of temper; and if it had been solemnized in France during the earlier period of the revolution, the mere consent of the parties ought to suffice for dissolving it here. Indeed, another consequence would follow from this doctrine of confounding with the nature of the contract that which is only a matter touching the jurisdiction of the Courts, and their power of dealing with the rights and duties of the parties to it: if there were a country in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing *in pais* to separate, every other country ought to sanction a separation had *in pais* there, and uphold a second

marriage contracted after such a separation. It may safely be asserted, that so absurd a proposition never could for a moment be entertained; * and yet it is not like, * 585 but identical with the proposition upon which the main body of the appellant's argument rests, that the question of indissoluble or dissoluble must be decided in all cases by the *lex loci*.

Hitherto we have been considering the contract as to its nature and solemnities, and examining how far, being English, and entered into with reference only to England, it could be dissolved by a Scotch sentence of divorce. But the circumstance of parties belonging to one country marrying in another (which is the case before us) presents the question in another light. In personal contracts much depends upon the parties having regard to the country where it is to be acted under, and to receive its execution; upon their making the contract, with a view to its execution in that country. The marriage-contract is emphatically one which parties make with an immediate view to the usual place of their residence. An Englishman, marrying in Turkey, contracts a marriage of an English kind, that is, excluding plurality of wives, because he is an Englishman, and only residing in Turkey and under the Mahometan law accidentally and temporarily, and because he marries with a view of being a married man and having a wife in England, and for English purposes; consequently the incidents and effects, nay, the very nature and essence (to use the language of the appellant's argument) must be ascertained by the English, and not by the Turkish law. So of an Englishman marrying in Prussia, where incompatible temper, that is, disagreement, may dissolve the contract; as he marries with a view to English domicile, his contract will be judged by English law, and he cannot apply for a divorce here, upon the ground of incompatible tempers. In *like manner, a * 586 domiciled Scotchman may be said to contract not an English but a Scotch marriage, though the consent wherein it consists may be testified by English solemnities. The Scotch parties, looking to residence and rights in Scotland, may be held to regard the nature and incidents and conse-

quences of the contract, according to the law of that country, their home: a connection formed for cohabitation, for mutual comfort, protection, and endearment, appears to be a contract having a most peculiar reference to the contemplated residence of the wedded pair; the home where they are to fulfil their mutual promises, and perform those duties which were the objects of the union; in a word, their domicile; the place so beautifully described by the civilian: "*Domicilii quoque intuitu conveniri quisque potest, in eo scilicet loco, in quo larem, rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet, undeque cum profectus est, peregrinari videtur.*" (a)¹ It certainly may well be urged, both with a view to the general question of *lex loci*, and especially in answering the argument of the alleged essential quality of indissolubility, that the parties to a contract like this must be held emphatically to enter into it with a reference to their own domicile and its laws; that the contract assumes, as it were, a local aspect; but that at any rate, if we infer the nature of any mutual obligation from the presumed intentions of the parties, and if we presume those intentions from supposing that the parties had a particular system of laws in their view (the only foundation of the argument for the appellant), there is fully more reason to suppose they had the law of their own home * 537 in their view, where they proposed to * live, than the law of the stranger, under which they happened for the moment to be.

Suppose we take now another but a very obvious and intelligible view of the subject, and regard the divorce not as a remedy given to the injured party, by freeing him from the chain that binds him to a guilty partner, but as a punishment inflicted upon crime, for the purpose of preventing its repetition, and thus keeping public morals pure. The language of the Scotch Acts plainly countenances this view of the matter, and we may observe how strongly it bears upon the present question. No one can doubt that every State has the right to visit offences with such penalties as to its legislative

(a) Voet ad Pand. Lib. 5, tit. 1, § 92.

¹ See *Forbes v. Forbes*, 18 Jur. 642, 647.

wisdom shall seem meet. At one time adultery was punishable capitally in England; it is so, in certain cases, still by the letter of the Scotch law. Whoever committed it must have suffered that punishment, had the law been enforced, and without regard to the marriage, of which he had violated the duties, having been contracted abroad. Indeed, in executing such statutes, no one ever heard of a question being raised as to where the contract had been made. Suppose again that the proposition, frequently made in modern times, were adopted, and adultery were declared to be a misdemeanor, could any one, tried for it either here or in Scotland, set up in his defence, that to the law of the country where he was married there was no such offence known? In like manner, if a disruption of the marriage tie is the punishment denounced against the adulterer for disregarding its duties, no one can pretend that the tie being declared indissoluble by the laws of the country where it was knit, could afford the least defence against the execution of the law declaring its * dissolution to be the penalty of the * 538 crime. Whoever maintains that the Scotch Courts are to take cognizance of the English law of indissolubility when called upon to inflict the penalty of divorce, must likewise be prepared to hold that, in punishing any other offence, the same Courts are to regard the laws of the State where the culprit was born, or where part of the transaction passed; that, for example, a forgery being committed on a foreign bill of exchange, the punishment awarded by the foreign law is to regulate the visitation of the offence under the law of Scotland. It may safely be asserted, that no instance whatever can be given of the criminal law of any country being made to bend to that of any other in any part of its administration. When the Roman citizen carried abroad with him his rights of citizenship, and boasted that he could plead in all the Courts of the world *civis Romanus sum*, his boast was founded not on any legal principle, but upon the fact that his barbarian countrymen had overrun the world with their arms, reduced all laws to silence, and annihilated the independence of foreign legislatures. Their orators regarded this very plea as the badge of universal slavery, which their warriors had

fixed upon mankind. But if any foreigner had come to Rome, and committed a crime punishable with loss of civil rights, he would in vain have pleaded in bar of the *capitis diminutio*, that citizenship was indelible and indestructible in the country of his birth. The *lex loci* must needs govern all criminal jurisdiction, from the nature of the thing and the purpose of that jurisdiction. How then can we say, that when the Scotch law pronounces the dissolution of a marriage to be the punishment of adultery, the Scotch Courts * 539 can be justified in importing * an exception in favour of those who had contracted an English marriage; an exception created by the English law, and to the Scotch law unknown?

But it may be said, that the offence being committed abroad, and not within the Scotch territory, prevents the application to it of the Scotch criminal law. To this it may however be answered, that where a person has his domicile in a given country, the laws of that country to which he owes allegiance may visit even criminally offences committed by him out of its territory. Of this we have many instances in our own jurisprudence. Murder and treason, committed by Englishmen abroad, are triable in England and punishable here. Nay, by the bill which I introduced in 1811, and which is constantly acted upon, British subjects are liable to be convicted of felony for slave-trading, in whatever part of the world committed by them. It would no doubt be going far to hold the wife criminally answerable to the law of Scotland, in respect of her legal domicile being Scotch. But we are here not so much arguing to the merits of this case, which has abundant other ground to rest upon, as to the general principle; and at any rate the argument would apply to the case most frequently mooted, of English married parties living temporarily in Scotland, and adultery being there committed by one of them. To such a state of facts the whole argument now adduced is applicable in its full force; and without admitting that application, I do not well see how we can hold that the Scotch legislature ever possessed that supreme power which is absolutely essential to the very nature and existence of a legislature. If we deny

this application, we truly admit that the Scottish Parliament had no right to punish the offence of adultery by the penalty of divorce. Nay, we hold * that English * 540 parties had a right to violate the Scotch criminal law with perfect impunity in one essential particular; for, suppose no other penalty had been provided by the Scotch law except divorce, all English offenders against that law must go unpunished. Nay worse still, all Scotch parties who chose to avoid the punishment had only to marry in England, and then the law, the criminal law of their own country, became inoperative. The gross absurdity of this strikes me as bearing directly upon the argument, and as greater than that of any consequences which I remember to have seen deduced from almost any disputed position. It may further be remarked that this argument applies equally to the case, if we admit that the Scotch divorce is invalid out of Scotland, and consequently that it stands well with even the principles of Lolley's case.¹

In order to dispose of the present question, it is not at all necessary on the one side, to support, or on the other to impeach, the authority of Lolley's case, or of any other which may have been determined in England upon that authority. This ought to be steadily borne in mind. The resolution in Lolley's case was, that an English marriage could not be dissolved by any proceeding in the Courts of any other country, for English purposes; in other words, that the Courts of this country will not recognize the validity of a Scotch divorce, but will hold the divorced wife dowable of an English estate, the divorced husband tenant thereof by the curtesy, and either party guilty of felony by contracting a second marriage in England. Upon the force and effect of such divorce in Scotland, and for Scotch purposes, the Judges gave, and indeed could give, no opinion; and as there would be nothing legally impossible in a marriage being good in one * country which was prohibited by the law of * 541 another, so if the conflict of the Scotch and English law be complete and irreconcilable, there is nothing legally

¹ See the remarks upon Lolley's case, in *Shaw v. Gould*, L. R. 3 H. L. 55, 71, 74, 85.

impossible in a divorce being valid in the one country which the Courts of the other may hold to be a nullity. Lolley's case, therefore, cannot be held to decide the present, perhaps not even to affect it in principle. In another point of view it is inapplicable; for, though the decision was not put upon any special circumstance, yet in fairly considering its application, we cannot lay out of view that the parties were not only married, but really domiciled in England, and had resorted to Scotland for the manifest purpose of obtaining a temporary and fictitious domicile there, in order to give the Scotch Courts jurisdiction over them, and enable them to dissolve their marriage; whereas here the domicile of the parties is Scotch, and the proceeding is *bond fide* taken by the husband in the Courts of his own country, to which he is amenable, and ought to have free access; and no fraud upon the law of any other country is practised by the suit. It must be added that, in Lolley's case, the English marriage had been contracted by English parties, without any view to the execution of the contract at any time in Scotland; whereas the marriage now in question was had by a Scotchman and a woman whom the contract made Scotch, and therefore may be held to have contemplated an execution and effects in Scotland.¹

But although, for these reasons, the support of my opinion does not require that I should dispute the law in Lolley's case, I should not be dealing fairly with this important question, if I were to avoid touching upon that subject; and as

no decision of this House has ever adopted that rule,
* 542 or assumed its * principle for sound, and acted upon it,

I am entitled here to express the difficulty which I feel in acceding to that doctrine — a difficulty which much deliberation and frequent discussion with the greatest lawyers of the age, I might say both of this and of the last age — has not been able to remove from my mind.

If no decision had ever been pronounced in this country, recognizing the validity of Scotch marriages between English parties, going to Scotland with the purpose of escaping from

¹ See the remarks of Lord Westbury upon this, in *Shaw v. Gould*, L. R. 8 H. L. 86, 87.

the authority of the English law, I should have felt it much easier to acquiesce in the decision of which I am speaking: for then it might have been said, consistently enough, that whatever may be the Scotch marriage law among its own subjects, and for the government of Scotch questions, ours is in irreconcilable conflict with it, and we cannot permit the positive enactments of our statute-book, and the principles of our common law, to be violated or eluded, by merely crossing a river, or an ideal boundary line. Nor could any thing have been more obvious than the consistency of those, who, holding that no unmarried parties, incapable of marrying here, can, in fraud of our law, contract a valid marriage in Scotland, by going there for an hour, should also hold the cognate doctrine, that no married parties can dissolve an English marriage, indissoluble here, by repairing thither for six weeks. But upon this firm ground the decisions of all the English Courts have long since prevented us from taking our stand. They have held, both the Consistorial Judges in *Compton v. Bearcroft*, and those of the common law in *Ilderton v. Ilderton*, the doctrine uniformly recognized in all subsequent cases, and acted upon daily by the English people, that a Scotch marriage, contracted by English parties in the face and in fraud * of the English law, is valid * 543 to all intents and purposes, and carries all the real and all the personal rights of an English marriage, affecting, in its consequences, land, and honours, and duties, and privileges, precisely as does the most lawful and solemn matrimonial contract entered into among ourselves, in our own churches, according to our own ritual, and under our own statutes.

It is quite impossible, after this, to say that we can draw the line, and hold a foreign law, which we acknowledge all-powerful for making the binding contract, to be utterly impotent to dissolve it. Were a sentence of the Scotch Court in a declarator of marriage to be given in evidence here, it would be conclusive that the parties were man and wife; and no exception could be taken to the admissibility or the effect of the foreign evidence, upon the ground of the parties having been English, and repaired to Scotland for the

purpose of escaping the provisions of the English law. A similar sentence of the same Court, declaring the marriage to be dissolved by the same law of Scotland, being now supposed to be given in evidence between parties who had married in England, can it, in any consistency of reason, be objected to the reception or to the force of this sentence, that the contract had been made, and the parties had resided here? In what other contract of a nature merely personal—in what other transaction between men—is such a rule ever applied—such an arbitrary and gratuitous distinction made—such an exception raised to the universal position, that things are to be dissolved by the same process whereby they are bound together; or rather, that the tie is to be loosened by revers-

ing the operation which knit it, but reversing the operation according to the same rules? What gave * force to the ligament? If a contract for sale of a chattel is made, or an obligation of debt is incurred, or a chattel is pledged, in one country, the sale may be annulled, the debt released, and the pledge redeemed, by the law and by the forms of another country, in which the parties happen to reside, and in whose Courts their rights and obligations come in question; unless there was an express stipulation in the contract itself against such avoidance, release, or redemption. But at any rate this is certain, that if the laws of one country and its Courts recognize and give effect to those of another in respect of the constitution of any contract, they must give the like recognition and effect to those same foreign laws when they declare the same kind of contract dissolved. Suppose a party, forbidden to purchase from another by our equity as administered in the Courts of this country (and we have some restraints upon certain parties which come very near prohibition), and suppose a sale of chattels by one to another party standing in this relation towards each other, should be effected in Scotland, and that our Courts here should (whether right or wrong) recognize such a sale, because the Scotch law would affirm it—surely it would follow that our Courts must equally recognize a rescission of the contract of sale in Scotland by any act which the Scotch law regards as valid to rescind it, although our own law may

not regard it as sufficient. Suppose a question to arise in the Courts of England respecting the execution of a contract thus made in this country, and that the objection of its invalidity were waived for some reason; if the party resisting its execution were to produce either a sentence of a Scotch Court declaring it rescinded by a Scotch matter done *in pais*, or were merely to produce * evidence of the thing * 545 so done, and proof of its amounting by the Scotch law to a rescission of the contract—I apprehend that the party relying on the contract could never be heard to say, “The contract is English, and the Scotch proceeding is impotent to dissolve it.” The reply would be, “Our English Courts have (whether right or wrong) recognized the validity of a Scotch proceeding to complete the obligation, and can no longer deny the validity of a similar but reverse proceeding to dissolve it—‘*unumquodque dissolvitur eodem modo quo ligatur.*’”

Suppose, for another example, that the law of this country precluded an infant or a married woman from borrowing money in any way, or from binding themselves by deed (which is the fact), and that in another country those obligations could be validly incurred; it is probable that our law and our Courts would recognize the validity of such foreign obligations. But suppose a *feme covert* in a foreign country had executed a power, and conveyed an interest under it to another *feme covert* in England, could it be endured that where the donee of the power produced a release under seal from the *feme covert* in the same foreign country, a distinction should be taken, and the Court here should hold that party incapable of releasing the obligation? Would it not be said that our Courts, having decided the contract of a *feme covert* to be binding, when executed abroad, must, by parity of reason, hold the discharge or release of the *feme covert* to be valid, if it be valid in the same foreign country?

Nor can any attempt succeed, in this argument, which rests upon distinctions taken between marriage and other contracts, on the ground that its effects govern the enjoyment of real rights in England, and * that the Eng- * 546
lish law alone can regulate the rights of landed prop-

erty. For, not to mention that a Scotch marriage between English parties gives English honours and estates to its issue, which would have been bastard had the parties so married, or pretended to marry, in England; all personal obligations may in their consequences affect real rights in England. Nor does a Scotch divorce, by depriving a widow of dower or arrears of pin-money charged on English property, more immediately affect real estate here, than a bond or a judgment released in Scotland according to Scotch forms, discharges real estate of a *lien*, or than a bond executed, or indeed a simple contract debt incurred in Scotland, eventually and consequentially charges English real estate.

It appears to me quite certain that those who decided Lolley's case did not look sufficiently to the difficulty of following out the principle of the rule which they laid down. At first sight, on a cursory survey of the question, there seems no great impediment in the way of a Judge who would keep the English marriage contract indissoluble in Scotland, and yet allow a Scotch marriage to have validity in England; for it does not immediately appear how the dissolution and the constitution of the contract should come in conflict, though diametrically opposite principles are applied to each. But only mark how that conflict arises, and how, in fact and in practice, it must needs arise as long as the diversity of the rules applied is maintained. When English parties are divorced in Scotland, it seems easy to say, "We give no validity to this proceeding in England, leaving the Scotch law to deal with it in that country; and with its awards we do not in anywise interfere." But the time speedily

* 547 arrives when we can no longer refuse * to interfere; and then see the inextricable confusion that instantly arises and involves the whole subject. The English parties are divorced—they return to England, and one of them marries again: that party is met by Lolley's case, and treated as a felon. So far all is smooth. But what if the second marriage is contracted in Scotland? and what if the issue of that marriage claims an English real estate by descent, or the widow demands her dower? Lolley's case will no longer serve the purpose of deciding the rights of the parties—for

Lolley's case is confined to the effects of the Scotch divorce in England, and professes not to touch, as, indeed, they who decided it had no authority to touch, the validity of that divorce in Scotland. Then the marriage being Scotch, the *lex loci* must prevail by the cases of *Compton v. Bearcroft*, and *Ilderton v. Ilderton*. All its consequences to the wife and issue must be dealt with by the English Courts; and the same Judge, who, sitting under a commission of gaol delivery, has in the morning sent Mr. Lolley to the hulks for felony, because he remarried in England, and the divorce was insufficient, sitting at Nisi Prius in the afternoon, must give the issue of Mrs. Lolley's second marriage an estate in Yorkshire, because she remarried in Scotland, and must give it on the precise ground that the divorce was effectual. Thus the divorce is both valid and nugatory, not according to its own nature, or the law of any one State, but according to the accident whether a transaction which follows upon it, and does not necessarily occur at all, chanced to take place in one part of the island or in the other; and yet the felony of the husband depended entirely upon his not having been divorced validly in Scotland, and not at all upon his not being divorced validly in England; and the * title * 548 of the wife's issue to the succession, or of herself to dower, depends wholly upon the same husband having been validly divorced in that same country of Scotland.

Nor will it avail to contend that the parties marrying in Scotland after a Scotch divorce, is in fraud of the English rule as laid down in that celebrated case. It may be so; but it is not more *in fraudem legis Anglicanæ*, than the marriage was in *Compton v. Bearcroft*, which yet has been held good in all our Courts. Neither will it avail to argue that the indissoluble nature of the English marriage prevents those parties from marrying again in Scotland as well as in England; for the rule in Lolley's case has no greater force in disqualifying parties from marrying in Scotland, where that is not the rule of law, than the English Marriage Act has in disqualifying infants from marrying without banns published; and yet these may, by the law of England, go and marry validly in Scotland. Indeed, if there be any purely personal

disqualification or incapacity caused by the law, and which, more than any other, may be said to travel about with the party, it is that which the law raises upon a natural *status*, as that of infancy, and infixes on those who, by the order of nature itself, are in that condition, and unable to shake it off, or by an hour to accelerate its termination.

If, in a matter confessedly not clear, and very far from being unincumbered with doubt and difficulty, we find that manifest and serious inconvenience is sure to result from one view, and very little, in comparison, from adopting the opposite course, nothing can be a stronger reason for taking the latter. Now surely it strikes every one that the greatest

hardships must occur to parties, the greatest embarrassment to * their rights, and the utmost inconvenience to the Courts of Justice in both countries, by the rule being maintained as laid down in *Lolley's case*: — The greatest hardship to parties; for what can be a greater grievance than that parties living *bond fide* in England, though temporarily, should either not be allowed to marry at all during their residence here, or if they do, and afterwards return to their own country, however great its distance, that they must be deprived of all remedy in case of misconduct, however aggravated, unless they undertake a voyage back to England, aye, and unless they can comply with the parliamentary forms in serving notices: — The greatest embarrassment to their rights; for what can be more embarrassing than, that a person's *status* should be involved in uncertainty, and should be subject to change its nature as he goes from place to place; that he should be married in one country, and single, if not a felon, in another; bastard here, and legitimate there? — The utmost inconvenience to the Courts; for what inconvenience can be greater than that they should have to regard a person as married for one purpose, and not for another — single and a felon if he marries a few yards to the southward; lawfully married if the ceremony be performed a few yards to the north — a bastard when he claims land; legitimate when he sues for personal succession — widow when she demands the chattels of her husband; his concubine when she counts as dowable of his land?

It is in vain to remind us of the opportunity which a strict adherence to the *lex loci*, with respect to dissolution of the contract, would give to violators of our English marriage law. This objection comes too late. Before the validity of Scotch marriages had been supported by decisions too numerous and too old for any * question, this argument *ab* * 550 *inconvenienti* might have been urged and set against those other reasons which I have adduced, drawn from the same consideration. But we have it now firmly established as the law of the land, and daily acted upon by persons of every condition, that, though the law of England incapacitates parties from contracting marriage here, they may go for a few minutes to the Scotch border, and be married as effectually as if they had no incapacity whatever in their own country, and then return, after eluding the law, to set its prohibitions at defiance without incurring any penalty, and to obtain its aid without any difficulty in securing the enjoyment of all the rights incident to the married state. Surely there is neither sense nor consistency in complaining of the risk, infraction, or evasion arising to the English law from supporting Scotch divorces, after having thus given to the Scotch marriages the power of eluding, and breaking, and defying that law for so many years.

I have now been commenting upon Lolley's case on its own principle — that is, regarding it as merely laying down a rule for England, and prescribing how a Scotch divorce shall be considered in this country, and dealt with by its Courts. I have felt this the more necessary because I do not see, for the reasons which have occasionally been adverted to in treating the other argument, how, consistently with any principle, the Judges who decided the case could limit its application to England, and think that it did not decide also on the validity of the divorce in Scotland. They certainly could not hold the second English marriage invalid and felonious in England, without assuming that the Scotch divorce was void even in Scotland. In my view of the present question, therefore, * it was fit to show that the Scotch Courts have * 551 a good title to consider the principle of Lolley's case erroneous even as an English decision. This, it is true, their

Lordships have not done ; and the judgment now under appeal is rested upon the ground of the Scotch divorce being sufficient to determine the marriage contract in Scotland only.

I must now observe, that supposing (as may fairly be concluded) Lolley's case to have decided that the divorce is void in Scotland, there can be no ground whatever for holding that it is binding upon the Scotch Courts on a question of Scotch law. If the cases and the authorities of that law are against it, the learned persons who administer the system of jurisprudence are not bound to regard — nay, they are not entitled to regard — an English decision, framed by English Judges upon an English case, and devoid of all authority beyond the Tweed.

Now, I have no doubt at all that the Scotch authorities are in favour of the jurisdiction, and support the decision under appeal ; but I must premise that, unless it could be shown that they were the other way, my mind is made up with respect to the principle, and I should be for affirming on that ground of principle alone, if precedent or *dicta* did not displace the argument. The principle I hold so clear upon grounds of general law, that the proof is thrown, according to my view, upon those who would show the Scotch law to be the other way.

In approaching this branch of the question, it is most important to remark, that there may be a very small body of judicial authority upon a point of law very well established in any country ; nay, that oftentimes the less doubtful the point is, the fewer cases will you find decided upon it.

* 552 Thus no one denies * that the Scotch Consistorial

Court had, ever since its establishment upon the Reformation, been in the practice of pronouncing sentences of divorce for adultery. The Catholic religion was abolished by the Parliament of Scotland in 1560 ; and three years after that important event, we find a statute made, the Act 1563, c. 74, in which, after a preamble expressing great and lively horror of the “ abominable and filthie vice of adultery ” (an opinion, perhaps, more sincere in the estates of Parliament than in the Queen), it is declared to be a capital offence, if “ notour ” (notorious) ; and all other adultery is to continue

punishable as before, but with an express saving of the right to "pursue for divorcement for the crime of adultery, conform to (according to) the law." For above two centuries the jurisdiction thus recognized by the statute had been exercised by the Consistorial Courts. Nor was any objection whatever made to the want of jurisdiction over parties, in respect of their domicile having been foreign or the marriage contracted abroad. In truth, the view which the law took of adultery as a crime punishable with even the severest of penalties, seems almost to preclude any such exception. If a person were indicted under the statute for notour adultery committed in Scotland, he clearly never could have defended himself by showing he had been married in England, and was only temporarily a resident in Scotland; so there seems never to have been any such distinction taken, in giving the injured party the civil remedy against the offender by dissolving the marriage. That Englishmen temporarily residing in Scotland have been in use to sue for divorces from marriages contracted in England, ever since the intercourse of the two countries became constant by the union first of the Crowns and then of the kingdoms, * is a fact * 553 of much importance, and it is not disputed. The importance of it is this — that the Courts administering the law of divorce have, with a full knowledge that they were dissolving English marriages, never inquired further than was necessary for ascertaining that the pursuers and defenders had acquired a domicile in Scotland, and then exercised the jurisdiction without scruple, and without any hesitation. This is a clear proof that the law, the Scotch law, was always understood among its practitioners, and by the Judges of the country, as the present decision supposes it to be; and such a long continued and unqualified practice is a fully better proof of what that law is, than even a few occasional decisions *in foro contentioso*. It would be a dangerous thing to admit that generally recognized and long continued practice should go for nothing, merely because, until a few years ago, no one had brought those principles and that practice in question, and because the judicial decisions in its favour were few in number, and of a recent date. There is every reason

to believe that in this, as in most other particulars, the more ancient law of England was the same with that of our northern neighbours. Between the Reformation and the latter end of Queen Elizabeth's reign, it was held that the consistorial jurisdiction extended to dissolve marriages *à vinculo* for adultery. (a)

It was, however, apparently not till 1789 that the question of jurisdiction was raised *in foro contentioso*, by the case of *Brunsdon v. Wallace*. But there a question was made upon the sufficiency of the *forum originis* to found a jurisdiction.

The husband, before marriage, had left Scotland * 554 without any intention of * returning, and so had the wife. The Judges were much divided, and the judgment was given with an express reference to the circumstances of the case, of which the absence of the defender, the husband, from Scotland, when and long before the suit was commenced, must be regarded as one. Nevertheless, as the majority of the Court considered the *forum originis* of both parties sufficient to found the jurisdiction, I should have thought this a decision against the principles which I deem to be recognized by later cases, had it stood untouched by these.

Pirie v. Lunan is, I believe, the next case ; but it was the case of a Scotch marriage between Scotch parties, and only raised the question of forum ; for both were domiciled in England. The Court sustained the jurisdiction *ratione originis*. This decision clearly proves little or nothing any way in the present question. And the same may be said of *Grant v. Pedie*. So *French v. Pilcher* turned on the wife, the defender being an Englishwoman and resident out of Scotland, and the adultery chiefly committed abroad ; and, accordingly, it does not touch, and hardly even approaches, any of the points now in dispute.

In *Lindsay v. Tovey*, the Court of Session sustained the jurisdiction in all respects, though the parties had been living separate under a deed. It is true that your Lordships, on appeal, remitted the case ; and that the death of one of the parties prevented any further proceedings. The ground of the remit was twofold : that the domicile of the husband

(a) 2 Burn's Eccl. Law, 508.

appeared to your Lordships (acting under Lord ELDON's advice) to be in England ; and that Lolley's case had not been considered by the Court below. Upon that case Lord ELDON pronounced no opinion, but he certainly intimated a doubt; and I can inform your Lordships *(having * 555 been counsel in the cause, and having, at the argument, given his Lordship a note of the judgment in Lolley's case) that he said, " It is a decision on which we probably shall hear a good deal more."

But since Lolley's case was decided, with the doctrine there laid down fully before them, and after maturely considering it, the Scotch Courts have repeatedly affirmed the jurisdiction in all its particulars. Those cases to which I particularly refer were decided in 1814, and the two or three following years. *Lovett v. Lovett*, and *Kibblethwaite v. Kibblethwaite*, both of the same date, 21st December, 1816, are those to which I shall particularly advert. In both cases the marriage was had in England ; in both, the parties were English by birth and by domicile ; in both, the suit was brought by the wife for the husband's adultery ; and the only domicile in Scotland being that required to give the Courts jurisdiction, the commissaries in both refused to divorce, on the ground, not of the indissolubility of the English marriage, but the insufficiency of the Scotch residence ; in both, the Court of Session, after the fullest discussion, with one dissentient voice, and that turning upon the question of domicile, sustained the jurisdiction, and remitted to the commissaries to proceed with the divorce.

Upon the other cases, of *Edmonstone v. Edmonstone*, and *Butler v. Forbes*, I need not dwell in detail. The state of the judicial authority on this question is fully given in the work of Mr. Ferguson, one of the most experienced of the Scotch Consistorial Judges. After referring to all the cases, the words of that learned person, though not to be cited as an authority, are well worthy of attention, as the testimony of a Judge sitting for so many years in the Scotch Consistorial * Court, and speaking to its uniform and * 556 established practice, twenty years after Lolley's case had been determined here. Mr. Ferguson says, " According to

these precedents, the municipal law of Scotland is also now applied by the consistorial judicature in all cases of divorce, without distinction, whether the parties are foreign or domiciled subjects and citizens of this kingdom; whether, when foreign, the law of their own country affords the same remedy or not, and whether they have contracted their marriage within this realm, or in any other; provided only that they have become properly amenable to the jurisdiction in this forum. None of these last-mentioned cases, nor indeed any other from Scotland, in which a question of international law could be raised for trial and judgment, having hitherto been appealed, the rule has for a period of more than ten years stood as fixed by them, and the subsequent practice has furnished additional instances of its application."

I think I need scarcely add, that this current of judicial authority, and still more the uniform practice of the Scotch Courts, unquestioned ever since the Reformation, establishes clearly the proposition in its largest sense, that the Scotch Courts have jurisdiction to divorce when a formal domicile has been acquired by a temporary residence, without regard to the native country of the parties, the place of their ordinary residence, or the country where the marriage may have been had.

But although it was necessary, to complete the view which I have taken of this important question, that I should advert to the cases which bear upon it in all its extent, there is no necessity whatever for our assenting to the proposition

* 557 in its more general and *absolute form, for the purpose of the case now before us. That is the case of a marriage contracted in England, between a man, Scotch by domicile and birth, and a woman about to become Scotch by the execution of the contract. It is moreover the case of a suit instituted in the Scotch Courts, while the pursuer had his actual domicile in Scotland, and his wife had the same domicile by law. To term a marriage so contracted an English marriage, hardly appears to be correct. I am sure it is, if not wholly a Scotch contract, at the least, a contract partaking as much of the Scotch as of the English. This, in my judgment, frees the case from all doubt; but as I have also

a strong opinion upon the more general question—an opinion not of yesterday, nor lightly taken up—I have deemed it fitting that I should not withhold it from your Lordships, and the parties, and the Court below, upon the present occasion.

Lord LYNDHURST. — My noble and learned friend has, in the judgment which he has just read, given your Lordships so full and clear a view of the state of the case, and of the law applicable to it, that it is not necessary for me to do more than communicate the result of my own opinions on the principal question submitted for your Lordships' decision. That question is one of great importance, not only to the parties immediately interested, but also to the public, on account of the principle which is involved in it. I have, on that account, from time to time during the argument, and since, given my best consideration to the subject, in the earnest desire to arrive at a just and satisfactory conclusion. I must, however, in the outset declare, that if I conceived that the judgment which your Lordships are now about to adopt, were * to be understood as affecting * 558 that delivered by the twelve Judges in Lolley's case, I should feel it my duty to object to so dangerous and precipitate a course—a course so likely to create inconvenience and embarrassment in its results—and should recommend to your Lordships, before you pronounced a final judgment, to review the principles of the law, and especially to request the assistance and opinions of the learned Judges of the Courts of law on the whole case, or so far at least as your judgment might be in conflict with their unanimous decision in the case of Lolley. It may be in the recollection of some of your Lordships that Lolley had been married in England, had subsequently gone to Scotland, and there procured a divorce, and then returned to England, where he married a second time, and was, in consequence, tried for bigamy. His defence was, that he had been legally divorced in Scotland; but the twelve Judges declared that the sentence of divorce pronounced in Scotland, however effectual there, could not be permitted to enable a party, who had previously solemnized one marriage in England, to effect a second in it while

his first wife was living. He was found guilty, and sentenced to transportation. That proceeding was not carried through lightly and unadvisedly; for it came before the assembled Judges of England, in the course of objections raised in reference to Lolley's plea of impunity, founded on the fact of the Scottish divorce, and supported by advocates of the first ability; yet the sentence, overthrowing the force of the Scottish ceremonial of divorce, was confirmed by the unanimous approbation of the twelve eminent individuals in England best fitted, by talent, legal knowledge, and great experience, to pronounce with the voice of undoubted authority

* 559 on the * wisdom of that decision. If, therefore, your

Lordships contemplate any interference with that sentence, so supported, it would only be just and wise to take care that such interference is warranted, and, as a consistent preliminary, to consult those twelve individuals, and obtain their assistance on this important point. It has been stated that Lord ELDON has entertained some doubts on the propriety of that decision; but my noble and learned friend is hardly warranted in drawing such a conclusion, or so interpreting what might have dropped from that learned Lord, who was then at the head of the law, and would certainly not have allowed Lolley to be punished, if he had not fully acquiesced in the principle involved in the sentence, and confirmed by the twelve Judges. But Lolley's case has received further confirmation; for my noble and learned friend, sitting in the Court of Chancery, deciding a case which came before him there in 1831, referred to this case of Lolley, and on the high authority of that case laid it down, in the most satisfactory manner, that an English marriage could not be dissolved or affected by a Danish or other foreign divorce. [His Lordship read, from the printed case, the observations said to be made by Lord BROUGHAM upon Lolley's case, when giving judgment in the case in Chancery, (a) and proceeded thus:] If after this confirmation of Lolley's case by my noble and learned friend, and by Lord ELDON, as my noble and learned friend distinctly states in the judgment which I have read — if after all this your Lordships intend to pronounce this judgment as

(a) *Vide M'Carthy v. De Caix, infra*, p. 568.

interfering with the principle established in *Lolley's case*, my opinion is, that we should have a new hearing before the twelve * Judges, that we may have the question * 560 settled advisedly once for all, and know henceforth with certainty what the law shall be in Great Britain.

It must be admitted that the legal principles and decisions of England and Scotland stand in strange and anomalous conflict on this important subject. As the laws of both now stand, it would appear that Sir George Warrender may have two wives; for, having been divorced in Scotland, he may again marry in that country: he may live with one wife in Scotland most lawfully, and with the other equally lawfully in England; but only bring him across the border, his English wife may proceed against him in the English Courts, either for restitution of conjugal rights, or for adultery committed against the duties and obligations of the marriage solemnized in England: again, send him to Scotland, and his Scottish wife may proceed, in the Courts in Scotland, for breach of the marriage contract entered into with her in that country. Other various and striking points of anomaly, alluded to by my noble and learned friend, are also obvious in the existing state of the laws of both countries; but however individually grievous they may be, or however apparently clashing in their principles, it is our duty, as a Court of Appeal, to decide each case that comes before us according to the law of the particular country whence it originated, and according to which it claims our consideration; leaving it to the wisdom of Parliament to adjust the anomaly, or get rid of the discrepancy, by improved legislation.

The real question now before us amounts to this: whether in the law of Scotland a divorce obtained in Scotland, as decided by the Scottish Judges, is supported and justified by the invariable course of the law of Scotland. We are now sitting as a Scottish * Court of Appeal, this case * 561 coming thence to us, and as such we must be guided by a reference to the principles of the law of that country. In English cases, on the contrary, we sit as an English Court of Appeal, and must equally be guided by the spirit of the laws prevailing here. As to the first question — the point of

the domicile — it is fully established by all the papers produced in the case, and was without hesitation admitted by counsel on both sides, in the preliminary argument, that Sir George Warrender has been a domiciled resident in Scotland during the whole period, from his marriage up to the commencement of the suit and to the present time. This is the basis of the whole case, and it therefore clearly follows that Lady Warrender became, as his wife, similarly domiciled in Scotland; for the principle of the law of both countries equally recognizes the domicile of the husband as that of the wife.¹ No point of law is more clearly established: that point being established, the subsequent deed of separation amounts to nothing more than a mere permission to one party to live separate from the other — not a binding obligation in the eye of the law — and there the matter rests. It confers no release of the marriage contract on either party, and neither can thereupon presume to violate it. The letter of Sir George Warrender cannot alter the principle of law. The strongest articles of separation may be drawn up and signed with full acquiescence of husband and wife, yet he may sue her and she may sue him notwithstanding. It is at the most a mere temporary arrangement, a permission to live elsewhere; but the legal domicile remains as it was. One may pledge himself not to claim or institute a suit for conjugal rights; but he cannot be bound by any such pledge, * 562 for it is against the inherent condition * of the married state, as well as against public policy. It is said that Lord ELDON, in the case of *Tovey v. Lindsay*, in this House, threw some doubt on the principle, and seemed inclined to give effect to those deeds of separation; but I am of opinion, on the authority of cases deliberately decided by that noble Lord himself, that the deed of separation here cannot affect the domicile, or any other condition inherent in the relation of husband and wife, or be any bar to the husband's suit.

The next point in the case regards the *locus delicti*. The allegations in the summons are, that the adultery was committed in France, and other countries abroad. We must

¹ See Story Conf. Laws, §§ 46, 186.

assume for the present that Lady Warrender is innocent of these charges; they are not to be taken as facts proved in the cause: she may, for any thing that has yet appeared in this suit, be as pure and spotless as any woman in the country. But it is proper to remark, that it is no bar or objection to the suit, that the adultery was committed, not in this country, but in a foreign country: the law, either in this country or in Scotland, makes no distinction in respect of the place of the commission of the offence. An action for damages may be brought in this country for adultery committed abroad; that circumstance cannot have any effect even in the mitigation of damages. There is no validity in this objection of the place where the adultery is alleged to have been committed.

On the third plea depends the main question in the appeal; and it is, whether it is competent for the Scotch Courts, on proof or admission of adultery, to pronounce a decree of divorce in a marriage which was contracted and solemnized in England. I may here observe, that marriage is looked upon, in the international spirit of the laws of almost every country * in Europe, as a Christian contract, * 563 equally binding on the parties wheresoever they may be found; and in looking to the propriety of the law of divorce in Scotland, it must be treated as a question of remedy for a violation of nuptial rights—rights guaranteed by peculiar ceremonials in every country, and in enforcing respect to which each country has a right to provide what remedy it pleases. In ascertaining what the principle of that remedy may be in any country, the safest rule is to look to the decisions of the Courts of that country. In Scotland these are found, in perfect agreement with each other, extending in its records over the space of a century, and embodying a principle which, till the case of *Lolley* occurred in England, was never doubted or disputed. In *Gordon v. Englegraaff*, (a) in the year 1699, the marriage was contracted in Holland, between a Scotchman and a native of Amsterdam. All that was in proof was the fact of adultery committed by her in Holland, and the Scotch Court pronounced a decree of divorce at the

(a) Fac. Coll. 9 June, 1699; S. C., Ferg. Cons. App. 251.

suit of the husband. In *Graham v. Wilkieson*, (a) in 1726, the parties were married in Ireland; the husband a Scotchman, and the wife an Irishwoman. A suit for divorce, on the head of adultery, was instituted by the husband in Scotland, and a decree was pronounced. In 1731 happened the case of *Scot v. Boucher*: (b) the marriage was had in England with an Englishwoman, and the adultery was alleged to have been committed in England. The husband, a Scotchman, instituted a suit in the Consistorial Court of Edinburgh, and, on proof of her guilt, obtained in her absence a decree of * 564 divorce *à vinculo matrimonii*. * The case of *Urquhart v. Flucker*, (c) in 1787, was still stronger in relation to the present case. There a Scotchman in the army married at Boston, in New England, a native of that place; they cohabited there, and afterwards at Halifax, and lastly in London. The husband, finding proofs of adultery committed by the wife in all these places, brought his action for divorce in Scotland, and obtained a decree accordingly. In none of these cases was the objection made that the Court in Scotland had not jurisdiction, because the marriage was solemnized or the adultery committed abroad. No doubt was entertained of the jurisdiction, upon the proof of the adultery, until the year 1789, when the case of *Brunsdon v. Wallace*, or *Dunlop*, (d) occurred. The parties there were married in England; the question of domicile was the only point contested. The Consistorial Court proceeded to entertain the action, brought by the wife in absence of the husband, who was cited edictally; but on his appearance, and appeal to the Court of Session, the action was ordered to be dismissed, on the ground that the parties were not domiciled in Scotland. Up to that period the decisions in the Scotch Courts were uniform, and so they continued afterwards; as in the case of *The Duchess of Hamilton v. The Duke of Hamilton*, in 1794. (e) That was an English marriage, according to the English law and ritual;

(a) Fac. Coll. 16 December, 1726; S. C., Ferg. Cons. App. 252.

(b) Fac. Coll. 6 March, 1731; S. C., Ferg. Cons. App. 252.

(c) Fac. Coll. 25 January, 1787; S. C., Ferg. Cons. App. 259.

(d) Fac. Coll. 9 February, 1789; S. C., Ferg. Cons. App. 259.

(e) Fac. Coll. 7 February, 1794; S. C., Ferg. Cons. App. 260.

sentence of divorce *à vinculo* was nevertheless pronounced by the Scotch Courts, on proof of adultery. Next came the case of *Lindsay v. Tovey*, (a) in Scotland, in 1807, which was brought by appeal to this House about the time that Lolley's * case was decided by the twelve Judges of * 565 England. In consequence of doubts entertained by Lords ELDON and REDESDALE, and the great importance of the question then raised for the first time, as to the jurisdiction, the case of *Lindsay v. Tovey* (b) was remitted for further consideration. The pursuer in that case unfortunately died, and no further proceedings were taken. The Courts in Scotland, however, continued to sustain and exercise the same jurisdiction; as appears by a series of cases, which are briefly stated in Ferguson's Consistorial Reports, and Appendix: as, *Utterton v. Tewsh*; *Rodgers v. Wyatt*, in 1811; *Hilary v. Hilary*, and *Sugden v. Lolley*, in 1812; *Pollock v. Russell Mannors*, in 1813; *Homfray v. Newte*, and *St. Aubyn v. O'Brien*, in 1814. All these cases were uniformly decided according to the law and practice of Scotland. Then came the case of *Gordon v. Pye*, in 1815, which I mention for the purpose of showing a difference of opinion between the Judges of the Consistorial Court in Scotland, the majority of whom came to the conclusion, that in consequence of what was done by the Judges of England, in Lolley's case, the Courts of Scotland ought not to interfere with English marriages. But afterwards came the case of *Edmonstone v. Lockhart*, or *Edmonstone*, in 1816; in which the question was raised as to the validity of a defence to an action of divorce in Scotland, that the marriage took place in England. That case was brought before the fifteen Judges of the Courts of Scotland—the very thing which Lord ELDON desired, in remitting the case of *Lindsay v. Tovey*—and they were unanimously of opinion, that according to the law of Scotland, notwithstanding the marriage was * had in * 566 England, it was competent for the Courts of Scotland to pronounce sentence of divorce *à vinculo*. The arguments of Lord ROBERTSON, one of the Judges of the second division of

(a) Fac. Coll. 27 January, 1807; S. C., Ferg. Cons. App. 265.

(b) 1 Dow, 117.

the Court of Session, delivered by him in support of his opinion, and printed in Mr. Ferguson's Appendix (a) to his report of that and other cases, have satisfied my mind that it is the law of Scotland that the Courts there have, without reference to the country where the marriage was contracted, been used from a very remote period to pronounce sentence of divorce for adultery. The decisions of the Courts of a country are the best proofs of the law of that country, and they are our best guides. There was no doubt, or suggestion of a doubt, what the law of Scotland was on those questions, until Lolley's case brought it into question, and the doubts raised by that were removed very soon after by the fifteen Judges, in *Edmonstone v. Edmonstone*. Though only an English lawyer, and only picking up Scottish law during the three years that I had the honour of attending to cases that came before us, sitting here in a Court of Appeal, yet I am quite satisfied with the decision of the Scottish Judges in the present case, and I should act very inconsistently if I should advise your Lordships to reverse their judgment. I am clearly of opinion that the domicile is established: the husband's is clearly so, as admitted; the wife's follows the husband's. The deed of separation does not affect the rule of law. The objection as to citation has been virtually abandoned, and the law of Scotland gives the remedy of divorce without reference to the country in which the marriage was contracted or the adultery committed. If my noble and learned friend

* 567 thinks that your Lordships' * judgment will affect the decision in Lolley's case, then, whatever inconvenience may be sustained, it would be advisable to call in the aid of the learned Judges; but my opinion is, that it does not break in on that case. As to a reconciliation of the conflict of the laws of the two countries, Parliament must effect that, for it alone is competent to interfere, as it has done from time to time, to remove other inconveniences. I shall, therefore, advise your Lordships to affirm the decision of the Court below.

LORD BROUGHAM.—I think that this judgment does not

(a) p. 393.

break in on Lolley's case. This is a decision in reference to the law of Scotland; a judgment founded on which, we now, as a Court of Appeal, confirm. Lolley's case refers to the law of England. The note of what I said in Chancery, in *M'Carthy v. De Caix*, read from the printed case by my noble and learned friend, may or may not be correct:¹ I did not correct this note, nor did I know of it until I saw it in these papers. Whatever opinion I may have entertained of Lolley's case in the Court of Chancery, or privately, cannot affect my judicial opinion in this House, sitting as a member of a Court of appeal on a case from Scotland.

The interlocutor of the Court below was affirmed.

Lolley's Case and *M'Carthy v. De Caix*, having been so often referred to, the reporters think it may be useful to add here a brief notice of the main facts of both.

ANN SUGDEN, otherwise *LOLLEY v. WILLIAM MARTIN LOLLEY*.

Mrs. Lolley, whose maiden name was Sugden, raised an action of divorce against her husband in the Consistorial Court of Scotland. She stated in her summons, that in the *year 1800 she was married *568 to the defender at Liverpool, where they afterwards cohabited for some time as man and wife. She afterwards accompanied him to Carlisle, and thence to Edinburgh, where he alleged that he had business. They lived together there in lodgings for some short time. She then charged the defender with having been guilty of adultery both in England and Scotland, and concluded for a divorce in the usual form. The defender appeared, and admitted the marriage and cohabitation in Liverpool, &c., but denied the adultery. The commissaries, in respect that the parties appeared to be English, and the marriage an English contract, appointed the pursuer to state in a condescendence the grounds in law and fact on which the Court was competent to entertain the action. A condescendence and answers were accordingly given in, and various acts of adultery by the defender were proved. The commissaries suspecting collusion, examined both parties judicially, but finding no proof thereof, decreed for a divorce. Extracted from Fac. Collection, 20th March, 1812.

Lolley was afterwards tried at the Lancashire summer assizes, 1812, for having married Ann Hunter at Liverpool, his former wife, Ann Sugden, being then living. The marriages, and the fact that Ann Sug-

¹ See *Gails v. Dickenson*, 17 Jur. 428.

den was alive a week before the assizes, were proved. The prisoner's defence was, that he had been divorced from Ann Sugden in Scotland, and that his present wife knew the fact. The decree of divorce was produced.

The prisoner was found guilty, but sentence was respited to the then next assizes. The case was afterwards argued before all the Judges, at Serjeants' Inn Hall, and the conviction was affirmed. See Russ. & Ryan's C. C. 287.

M'CARTHY v. DE CAIX.

A person of the name of Tuite, a domiciled Dane, was married in England to an Englishwoman. They left England and went to Denmark, where they were subsequently divorced. The wife returned to her relations in this country and died, leaving Mr. Tuite her surviving, in Denmark. After his death a suit was instituted in England between his and her personal representatives, respecting some property the right to which accrued to her subsequently to the divorce.

* 569 * Lord BROUGHAM, Chancellor, in giving his judgment on the points in issue, said: A gentleman of the name of Tuite, contracted a marriage, which was legally solemnized in England. He was himself a Dane by birth and by domicile. He removed immediately the person whom he had made his wife, from this country—the *locus contractus*, with which he appears to have had no further connection than so far as he was married to an Englishwoman—to his own country, where his domicile continued, and in that country the marriage was dissolved by a valid Danish decree of divorce; dissolved as far as the Danish law could dissolve it, but which divorce could not, by the law of this land, as it is fully established by the solemn opinion of the twelve Judges, in a fully argued and most maturely considered case, operate to dissolve, or in any manner be made to affect here an English marriage. Lolley's case was the strongest that can possibly be imagined in favour of the doctrine laid down, as it was not a question of a civil right, but a conviction for felony in having contracted a second marriage during the existence of the first. Lolley—for whom I was counsel before the twelve Judges, Mr. Justice LITLEDALE being on the other side—had, you may say, acted *bond fide*, but the Statute of James I. does not make any difference whether a man acts with an innocent ignorance, or a guilty knowledge, and says, if A. B. shall marry C. D., when his former wife, E. F., is alive, he is guilty of felony; there being no exception but that of the proviso of being absent seven years abroad, which is one exception, and a divorce at Doctor's Commons, which is another. Lolley, in a perfect belief that a Scotch divorce—which all the Scotch lawyers told him, and which many of the Scotch lawyers still hold to be the law in Scotland, notwithstanding Lolley's case—had perfectly and validly dissolved the first marriage, intermarried in England with a second wife. He was tried at Lancaster, and was convicted, the point being saved for the

opinion of the twelve Judges, and the point was argued before the twelve Judges, including some of the most learned Judges of our day, Lord ELLENBOROUGH, Lord Chief Justice GIBBS, Chief Baron THOMSON, Mr. Justice BAYLEY, Mr. Baron WOOD, and Mr. Justice LE BLANC, some of the most eminent and able lawyers that I have ever known in Westminster Hall, who, after hearing * this case argued during * 570 term, and at Serjeant's Inn after term, gave a clear, decided, and well-weighed opinion, all in one voice finding that no divorce, or proceeding in the nature of a divorce, or tending towards a divorce, obtained in any foreign country, Scotland included, could dissolve *à vinculo matrimonii*, a contract of marriage, in England; and they sentenced Lolley to seven years' transportation. He was sent to the hulks for one or two years; and after being at the hulks one or two years instead of going to Botany Bay, the residue of the sentence was in mercy remitted. I took the liberty of saying at that time, perhaps feeling the prejudice of a counsel in favour of his client, that he ought not to have gone to the hulks, because he acted *optima fide*, that he really believed what, to this day, many of the Scotch lawyers, and at that day all the Scotch lawyers said was the law in Scotland, that a Scotch divorce could dissolve an English marriage, and upon that he acted; and many other men of high rank in this country had acted in the same way, except that they had taken the precaution of contracting the second marriage in Scotland, but if they had come across the Tweed, and contracted a marriage in England, they would have been liable to the same penalty, because it would have been an English marriage which they had in *fraudem legis* contracted. Lolley was sent to the hulks to show the clear opinion of the Judges upon the law, and part of his sentence was remitted afterwards, only because it was thought, that under the particular circumstances of his case he had suffered enough. Now, therefore, Lolley's case lays down these two points, that no foreign proceeding in the nature of a divorce can affect an English marriage; and, secondly, that a Scotch divorce, in the Consistorial Court of that country, is not such a proceeding in an English Court as to bring the case within the provisos in the Polygamy Act, namely, a sentence dissolving an English marriage, and nothing but a sentence of divorce in the English Court, *à mensa et thoro*, can bring the party within the exception, even as regards felony.¹

[This case was stated at greater length in the appellant's printed case, from which it was read by Lord LYNDBURST. See *ante*, p. 559.]

¹ See *Geils v. Dickenson*, 17 Jur. 423.

* WRIT OF ERROR.

FROM THE COURT OF KING'S BENCH.

BIRTWHISTLE v. VARDILL.

1885.

DOE on the Demise of JOHN BIRT- }
 WHISTLE } *Plaintiff in Error.*
 AGNES VARDILL *Defendant in Error.*

Questio statûs. Legitimacy.

Qu., Whether a child, born in Scotland, of parents domiciled there, who at the time of his birth were not married, but who afterwards intermarried in Scotland (neither having in the mean time married any other person), can take as heir lands of his father in England.¹

IN Hilary term, 1825, the plaintiff in error brought an action of trespass and ejectment against the defendant in error, for one undivided third part of lands situate in several parishes in Yorkshire, and the same was tried at the Yorkshire spring assizes of that year, when the jury found a special verdict; which was in substance, that William Birtwhistle, being seised in his lifetime, in his demesne as of fee, of and in one undivided third part of and in the premises mentioned in the declaration, died so seised on the 12th of May, 1819, without leaving any issue of his body; that all the brothers of the said William Birtwhistle had died, in his lifetime, unmarried and without issue, except Alexander, who married and had issue in the manner hereinafter mentioned: That the said Alexander Birtwhistle went from England to Scotland in the year 1790, and became domiciled there, and dwelt there until the time of his death; that one Mary Purdie was also a person dwelling and domiciled in Scotland during the whole time that the said Alexander Birtwhistle was domiciled there, and the said Alexander

¹ This question was settled against the heir, in *Birtwhistle v. Vardill*, 7 Cl. & Fin. 895. See *In re Wilson's Trusts*, L. R. 1 Eq. 247.

Birtwhistle did there cohabit with the said Mary * Purdie, and did beget upon her the said John Birt- * 572 whistle (the plaintiff in error), who was their only son, and was born in Scotland on the 15th of May, 1799; that on the 6th of May, 1805, the said Alexander Birtwhistle and Mary Purdie were married in Scotland, according to the laws of Scotland, and on the 5th of February, 1810, the said Alexander Birtwhistle died in Scotland, seised to him and his heirs of divers lands and tenements there situate, leaving the said John Birtwhistle him surviving, who, after the death of his father, was duly, according to the law of Scotland, served heir to the said lands and tenements of the said Alexander Birtwhistle, and now holds and enjoys the same in his own right, having from the time of his birth hitherto remained in Scotland, and been domiciled there; that if a marriage of the mother of a child with the father of such child takes place in Scotland, such child, born in Scotland before the marriage, is equally legitimate by the law of Scotland with children born after the marriage, for the purpose of taking land, and every other purpose, &c. (a) The question was, whether he could, as heir of his father, take the lands in England. The case was argued by *Mr.* (now Lord Chief Justice) *Tindal*, for the plaintiff, and by *Mr. Courtenay* for the defendant; and the Court, consisting of Lord Chief Justice ABBOTT (afterwards Lord TENTERDEN), and Justices BAYLEY, HOLROYD, and LITTLEDALE, gave judgment for the defendant.

* The present writ of error was then brought, and * 573 the matter was argued in 1830 before the Judges, and a question was put to them, and they took time to consider it.

Lord Chief Baron ALEXANDER subsequently delivered their opinion as follows: My Lords, in this case the Judges have

(a) It was admitted on the argument in the Court below, that the Scotch law was not correctly stated in the case, but should have had subjoined to it this qualification: "if begotten and born while such father and mother respectively were unmarried, and if they respectively continued unmarried from the time when such child was begotten until their intermarriage." See 5 Barn. & Cress. 438 *et seq.*

agreed upon the answer which is to be given to the question put to them by your Lordships. The question is: "A. went from England to Scotland, and resided and was domiciled there, and so continued for many years till the time of his death. A. cohabited with M., an unmarried woman, during the whole period of his residence in Scotland, and had by her a son, B., who was born in Scotland. Several years after the birth of B., who was the only son, A. and M. were married in Scotland according to the laws of that country. By the laws of Scotland, if the marriage of a mother of a child with the father of such child takes place in Scotland, such child, born in Scotland before the marriage, is equally legitimate with children born after the marriage, for the purpose of taking land and for every other purpose. A. died seised of real estate in England, and intestate. Is B. entitled to such property, as the heir of A.?" It appears to us, that whenever a question of the nature put to us by your Lordships arises in an English Court of Justice, there are two points to which the attention of the Judge must be directed, separately, and in succession to each other. The first in order regards the *status* or condition of the claimant; the second is, what rules of inheritance the law of the country where the property is situated and the tribunal sits, has impressed upon the land, the subject of the claim. As to the first of these questions, I believe I express the opinions

of the Judges when I say, in the well-considered
 * 574 * language of Lord Stowell, in *Dalrymple v. Dalrymple*, that "The cause being entertained in an English Court, must be adjudicated according to the principles of English law applicable to such a case; but the only principle applicable to such a case by the law of England is, that the *status* or condition of the claimant must be tried by reference to the law of the country where the *status* originated: having furnished this principle, the law of England withdraws altogether, and leaves the question of *status* in the case put to the law of Scotland." Such is the sentiment of that great Judge, and such is his language, varied only so far as to apply to a question of legitimacy what was said of a question respecting the validity of a marriage. When the question of personal

status has been settled upon these principles, when it has been ascertained what the claimant's character and situation are, it becomes then necessary to inquire what are the rules and maxims of inheritance which the law of that country where the inheritance is placed, and whose tribunals are to decide upon it, has stamped and impressed upon the land in debate.

In order the more distinctly to explain what is meant, I will suppose a case, in many circumstances resembling the present. In addition to the circumstances stated in the question, let it be further supposed that the father and mother of the claimant had, after their marriage, one or more sons born to them. Suppose then the present claim to be made. The first inquiry having been satisfied, and it being upon that inquiry perfectly ascertained that the claimant is the eldest legitimate son of his deceased parent, for the purpose of taking land, and for every other purpose, by the law of Scotland, it will next be necessary to inquire what are the rules and maxims of inheritance which the law of England has impressed upon *that land which is the subject of *575 the claim. Let it further be supposed, that upon this inquiry it shall turn out that the land claimed is of that description which is called "borough-English." This being proved, we think it clear that the claimant's legitimacy by the law of Scotland, his right to inherit by that law, will give the claimant no right whatever to the land in England held in borough-English.

The comity between nations is conclusive to give to the claimant the character of the eldest legitimate son of his father, and to give him all the rights which are necessarily consequent upon that character; but what these rights are respecting English land must be left to the law of England, and the comity is totally ineffectual to alter, in the slightest degree, the rules of inheritance and descent which the law of England has attached to this English land. It would unquestionably descend upon the youngest son. I am anxious to mark clearly the distinction which I have pointed out, because it is upon that distinction that our opinion rests. I will therefore illustrate it by another example.

Take the case of *Ilderton v. Ilderton*: (a) that is the case of a claim to dower by a foreign widow: whether she is a widow or not, that is, whether she was the lawful wife of the man who was, during the coverture, seised of the land, is a question which the law of England permits, upon a claim to English land, to be determined by the foreign law, the law of the country where the contract of marriage was made: there the comity stops. When her character of widow shall have been fixed according to these foreign rules, the law of England comes into action, and proceeding inexorably by * 576 its own provisions and regulations, decides * what are the interests in the English land which her character of widow has conferred upon her: it inquires what are the rules which attach upon the particular land in favour of a widow. If, upon that inquiry, it appears that the land is subject to the common law, it will give her a third; if it appear to be gavelkind, one-half, while she remains *casta et sola*; if the land be customary land of any manor, the custom must be looked into, and she can have only what that custom may bestow, however strange and capricious that custom may be.

The distinction to which I am directing your Lordship's attention is very familiar to foreign jurists, and is noticed by them as the difference between real and personal *status*: the last being those which respect the person, and follow it everywhere; the first being those which are connected with the land, and adhere to it, and are as immovable as the subject to which they are applied.

My Lords, it appears to us that the answer to the question which your Lordships have put must be founded upon this distinction: while we assume that B. is the eldest legitimate son of his father in England as well as in Scotland, we think that we have also to consider whether that *status*, that character, entitles him to the land in dispute as the heir of that father? and we think that this question, inasmuch as it regards real property situated in England, must be decided according to those rules which govern the descent of real property in that country, without the least

(a) 2 H. Black. 145.

regard to those rules which govern the descent of real property in Scotland. We have therefore considered whether, by the law of England, a man is the heir of English land, merely because he is the eldest legitimate son of his father. We are of opinion that *these circum- *577 stances are not sufficient of themselves, but that we must look further, and ascertain whether he was born within the state of lawful matrimony; because, by the law of England that circumstance is essential to heirship; and that this is a rule not of a personal nature, but of that class which, if I may use the expression, is sown in the land, springs out of it, and cannot, according to the law of England, be abrogated or destroyed by any foreign rule of law whatsoever. It is this circumstance which, in my opinion, dictates the answer which we must give to your Lordships' question; viz., that in selecting the heir for English inheritance, we must inquire only who is that heir by the local law. It has appeared to us, that the vice of the appellant's argument consists in treating the question of who shall be the heir to English land, as a question of personal *status*: so it is, no doubt, up to a certain point; but beyond that point, it becomes a question to be decided entirely by the local rules relating to real property in the realm of England.

That the rule of English law is what I have represented, can hardly require proof. If the argument from the comity of nations be shaken off, no person will doubt that a person legitimated *par subsequens matrimonium* is not the heir of English land. What Lord COKE says, in 7 b of the 1st Inst., affords the rule: "*Hæres*, in the legal understanding of the common law, implieth that he is *ex justis nuptiis procreatus*: for *hæres legitimus est quem nuptiæ demonstrant.*" Perhaps Lord COKE's expression would have been more precise and accurate, if instead of saying *ex justis nuptiis procreatus*, he had said, *ex justis nuptiis natus*. But this is what is meant, as all experience shows. It would be useless to follow *this further; but it will be material to recollect, that *578 this maxim, which pervades all our books, and which is confirmed by all our practice, though it is, in form, a

description of the person who shall be heir, is in substance, in our opinion, a maxim regarding the land, describes one of its most important qualities, traces out the course in which it shall descend, and is no more liable to be broken in upon by any foreign constitution than are the degrees of interest which the heir shall take in the land, the conditions on which he shall hold it, the proportion which a woman shall obtain as a widow, or the limitations and conditions attached to her estate.

I have endeavoured to state the principles, and to show the course of reasoning, which has conducted my learned brothers and myself to the conclusion that B., the person designated by your Lordships, is not entitled to the property in question, as the heir of A.

Before I finish I will notice two arguments used on behalf of the plaintiff in error, which merit particular attention. It is said for the plaintiff in error, that, according to the rule we adopt, if he is born in lawful wedlock, he fulfils every condition required of him : now they say that he is born in lawful wedlock, because, by a presumption of the Scottish law — a presumption *juris et de jure* — there was a marriage anterior to his procreation. It is by force of this presumption that he is legitimate ; by this fiction, he is born within the pale of lawful matrimony. We know that this fiction is, by many respectable writers on the Scottish law, represented as accompanying the legitimation *per subsequens matrimonium*. But we do not concede the consequence deduced from it as applicable to the present question. The question is what the law of England requires ; and, as we are advised, the

* 579 law of * England requires that the claimant should actually and in fact be born within the pale of lawful matrimony. We cannot agree that the presumption of a foreign jurisprudence, contrary to the acknowledged fact, should abrogate the law of England ; and that by such a fiction, a principle should be introduced, which, upon a great and memorable occasion, the legislature of this kingdom distinctly rejected : your Lordships will perceive that I allude to the Statute of Merton. It would seem strange to introduce, indirectly and from comity to a foreign nation, a rule

of inheritance which may affect every honour, and all the real property of the realm : which rule, when proposed directly and positively to the legislature, it directly and positively negatived and refused ; a refusal that in England has obtained the approbation of every succeeding age. Again, my Lords, it is said that two cases have been decided in this House which are nearly in point, and prove that the claim of B. ought to be supported : these are the cases of *Shedden v. Patrick*, and the *Strathmore Peerage Case*. These two cases are alike in principle, and establish the same propositions : in the one case, the parents lived in a state of concubinage in America ; and in the other, in England : in both, children were born to them. The parties afterwards married in their respective countries ; and by force of their marriage the American issue claimed Scottish land, and the English issue claimed Scottish honours : in both, your Lordships decided against the claimants. Now it is said, that these authorities are exactly the converse of the present case ; that they establish the principle, that the Courts of the country where the lands lie, in a question respecting the heirship to these lands or honours, inform themselves whether the claimant is * heir, not by the law of the country where * 580 the lands lie, but in the country of the domicile where the marriage of the parents was contracted ; and if he is not heir by that foreign law, his claim is rejected : from which this consequence is said to be deducible, that if he is heir, his claim should be sustained.

The argument presents itself in a very plausible shape, and was pressed at the bar, as it seemed to me, with striking ingenuity and force. But if I have had the good fortune sufficiently to explain the principles which have conducted my learned brothers and myself to the opinion I have stated, you will soon perceive that these principles afford a conclusive answer to it. The first step to be taken in every case of this kind, as I have already explained, is to inquire into the *status* of the claimant. The *status*, it is argued, is to be determined by the law of the foreign country : with this the *lex rei sitæ* does not intermeddle ; and intermeddles no more when that foreign law establishes the claimant's bastardy,

than when it proves his legitimacy. In both the cases the claimants were bastards: the laws of their own country, the laws of their domicile, the laws of the spot where the matrimonial contract was entered into, declared them to be illegitimate: the law which, by acknowledged principles, ascertained their personal *status*, fixed upon these persons a character of illegitimacy fatal to their claims; on the first step the ground sank under them, and it became impossible for them to advance.

It is obvious, that if in the cases to which I am now referring the claimants had been declared heirs by the Scottish law, the Scottish law admitting of no heirship without legitimacy, that law must have been called in aid

* 581 to bestow upon them that personal *character of

legitimacy refused to them by their own law: in other words, a law foreign to their birth, to their domicile, and to the marriage of their parents, would have been held to bestow upon them their personal *status* and character—a decision certainly contrary to the acknowledged principles on this subject. The character of illegitimacy attached to the persons of the English and American claimants by their own law, accompanied them everywhere, and would prevent their being received as heirs everywhere within the limits of the Christian world. This view, in our judgment, renders these decisions entirely consistent with the principles I have unfolded, and prevents our considering them as objections to the opinion we entertain, that B. is not entitled to the property in question as the heir of A.

My Lords, it is matter of satisfaction to us to reflect that this rule, held by us to be the rule of English law, is more useful and convenient than the rule opposed to it by the plaintiff in error. Convenience and utility, when they regard so important a subject as inheritance, appear to me of the highest consequence in the administration of justice. The rule I have stated, which limits the operation of the foreign law to fixing the personal *status*, and excludes it from any ulterior influence in regulating the succession to real property, has a manifest tendency to render the law of inheritance simple and uniform, by preserving it unaltered and

unchanged ; and by sending us to look for it among our own municipal institutions alone, and among the decisions of our predecessors applicable to such questions, it will exclude many difficult and intricate inquiries which might intrude themselves from foreign laws into this subject. Some of these were suggested at the bar in the argument

* for the defendant in error, and there would be many * 582 others whose details no human foresight can anticipate, although the various transactions of mankind, and the variety in the laws of foreign nations, would assuredly bring them upon us.

My Lords, I conclude that it is the humble opinion of all the Judges who have attended the argument of this case, that B., described in your Lordships' question, is not entitled to the property in England as the heir of A.

September 2.

LORD BROUGHAM. — My Lords, the extreme importance of the question raised by this special verdict in the Court below, and brought here by writ of error, has occasioned a more than ordinary delay in giving your judgment. It was argued in 1830 ; the learned Judges attended, and gave their opinion in favour of the principle upon which the judgment of the Court of King's Bench proceeded. I was counsel in the case, and I argued it in support of that judgment ; and it now falls to my lot, in the discharge of my judicial duties in this House, to state my opinion to your Lordships ; which I should not do had it been according to the argument which I maintained professionally at your bar ; but it is on the opposite side : it goes to impeach the judgment pronounced below, and to advise a reversal. I feel much uneasiness in adding, that this opinion is also unchanged by the authority of the arguments of the learned Judges, who unanimously supported that judgment in their answers to the question put by your Lordships. Whatever your Lordships may do in disposing of the case, I feel I should not perform my duty, if I withheld my opinion in this stage of the proceeding.

The facts of the case, as they appear on the special * verdict, are these : [His Lordship stated them.] In * 583

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1810 the father died in Scotland, whence he never had removed, and John succeeded to his Scotch estates, being by the Scotch law legitimate, in consequence of the marriage of his parents subsequent to his birth, and without any thing intervening between the birth of the child and the marriage of the parents which could have prevented them from contracting a marriage at any moment. The question is, whether or not he takes the English real estate as heir to his father

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deceased? In approaching this question, there are some things not disputed. It is admitted that the validity of a marriage must depend upon the law of a country where it is had, and that consequently the parents of this party were lawfully married. It seems also to be agreed that, generally speaking, legitimacy is a *status*, and must be determined by the law of the country to which the party belongs; but it is said by those who support this judgment, that whether the party here is legitimate or not is no question before us; the only question being, it is alleged, whether or not he is the heir to an English real estate. This distinction, I confess, appears to me founded on an indistinct view of the subject. It is true that the question here arises upon the claim of an heir as such, and that therefore the only question may be said to be, whether he is heir or not? But it is also very possible that this question may turn wholly upon another, namely, whether or not the claimant is eldest legitimate son of his father, the person last seised? Nor do I well see how legitimacy can ever come in question in any other way than as connected with the claim to succession, either real or personal,

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either in England or in Scotland, unless in the single * 584 case of a declarator of bastardy * or of legitimacy; a proceeding unknown in the English law. It is, therefore, by no means sufficient for deciding this case to say, that the question touches not legitimacy, but inheritance; not the personal *status* of the party, but his right to real property. It may touch both these matters, and the latter may wholly depend upon the former.

In truth, "legitimate son" means lawful son, and the rule of inheritance is, that the eldest lawful son shall succeed to the father; but "lawful or not" depends upon the law which

is to govern, and no other definition can be given of what is lawful, unless that he is lawful son whom the law declares to be such. What law? There are two, it is said, in this case — the law of the birthplace of the party and of his parents' marriage, and the law of the place where the land lies — then which of these two laws shall prevail? The whole inclination of every man's mind must be towards that law which prevails where each man is born, and where his parents were married, supposing the countries to be one and the same; and if they differ, I should then say certainly the law of the birthplace. Nor can any thing be more inconsistent with principle, than the inevitable consequence of taking the *lex loci rei sitæ* for the rule; because this makes a man legitimate or illegitimate, according to the place where his property lies, or rights come in question — legitimate when he sues for distribution of personal, a bastard when he sues for succession to real estate — nay, legitimate in one country, where a part of his land may be, and a bastard in some other, where he has the residue.

So in like manner, all who claim through him must have their rights determined by the same vague and uncertain canon; a circumstance which I nowhere * find * 585 adverted to below. I may say I am perfectly certain that it was not adverted to below; I expected it to be, and was apprehensive of the force of it, being aware of the difficulty I should have in meeting it. The arguments on behalf of the plaintiff in error were those which had been urged in the Court below, and we met them by the arguments we had urged in that Court. All the learned Judges proceed upon the case being one of an inheritance claimed by the party himself; but what if he were dead years ago, and another claimed an estate in England to which he (the alleged bastard) never had been, and never could have been entitled; an estate, for example, descending from a collateral, who took it by purchase after the death of the alleged bastard? Then the pedigree of the claimant must be made out through legitimate persons, and the question of legitimacy is raised as to one who is not himself claiming any land — who never did or could claim any land — and it is not raised in respect of

any right in him to inherit, any right to be called the heir to any land. I apprehend this shows strongly the necessity of taking a somewhat more enlarged view than the learned Judges seem to have deemed sufficient for getting them over the difficulty of the case, and of admitting that there is a *status* of legitimacy which is personal, and travelling about with the individual, must be determined by the law of the country of his birth.

Another view, which strikes me immediately as having been admitted below, is very important, and shows, like the last, how much less easy this question is to dispose of than the learned Judges have imagined. It is thought enough to say, the heir is he who is born in lawful wedlock, *ex justis nuptiis*. Then what is lawful wedlock? Is there any greater reason for being bound by the law of the country

* 586 * where the marriage contract was made, in deciding whether or not the wedlock was lawful, than there is for being governed, in ascertaining the legitimacy of the issue of the marriage, by the law of the country where that issue was born, more especially when it was also the country where the marriage was had? But can the Court stop short, according to its own principle, at the mere fact of the marriage being according to the *lex loci contractus*? Do not the principles on which their decision proceeds demand this further inquiry — were the parties able to marry by the law of the *lex loci rei sitæ*? And thus a door is opened to the further examination of how far a preceding divorce of one of the parties was sufficient to dissolve a previous English marriage. All such difficulties are got rid of by holding the *lex loci contractus et nativitatis* as governing the validity of the contract and legitimacy of the issue; but they are not to be got over in this way by any argument which does not with equal force apply to holding the legitimacy of the issue a question equally to be governed by the *lex loci contractus*, and the law of the birthplace. Nor is it correct to say, as the Judges below assumed, that the *lex loci* only influences the validity of the contract, and extends not to its effects: the highest authorities have held expressly the reverse. Huber, in the treatise “*De Conflictu Legum*,” which forms part of his larger work,

and is constantly cited as the greatest authority on this question, says, "Non solum ipsi contractus ipsæque nuptiæ certis locis rite celebratæ ubique pro justis et validis habentur, sed etiam jura et effectus contractuum nuptiarumque in iis locis recepti ubique vim suam obtinebunt." Book I. tit. '3, § 9. It would be difficult to state any thing more clearly and properly as to the effect of the matrimonial *con- *587 tract than the legitimacy of the issue; it is, in fact, the main object, and therefore the principal effect of the contract. But to remove all doubt on this subject, and to extend the same rule also to the *lex loci nativitatis*, he adds, "qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, cum hoc effectu, ut ubivis locorum eo jure quo tales personæ alibi gaudent vel subjectæ sunt fruantur et subjiciantur."

This principle was adopted and acted upon in several remarkable cases by your Lordships, then proceeding under the advice of Lord ELDON; I mean, *Shedden v. Patrick*, and *Strathmore v. Bowes*. In the former, a child having been born before marriage in America, where the English law prevails, claimed a Scotch estate, in respect of the subsequent marriage of his parents there, of whom the father was Scotch. He contended, that the question having arisen upon a real estate in Scotland, the Court of Session was bound to administer the *lex loci rei sitæ*, and that that law declared him legitimate. I argued the case on this precise ground, which was that adopted by the Court below in the present case, that there was no such thing as legitimacy in the abstract; that *ex vi termini legitimus* means he who is, under a certain law, entitled to certain rights; that a man might be legitimate in one country and illegitimate in another, legitimate for one purpose and bastard for another; that it was *secundum quid*, and not absolute; and a denial of the question of *status* was the very ground on which we maintained the argument of the then appellant. But the Court below, and your Lordships, held that legitimacy is a *status* to be determined by the law of the party's birthplace, or at any rate by that of the country where the marriage of his parents was had as well as himself born; and *they held him bastard in Scotland, *588

where the land lay, because he was bastard in America, where his birth and his parents' marriage took place.

In *Strathmore v. Bowes*, a marriage had in London after the birth of the child, was held not to legitimate the issue, either as to Scotch honours or estates, on the same grounds; and in both these cases, one of the points made for the judgment was, the absurdity of holding the same person to be bastard in one country and legitimate in another. It is plain that legitimacy has but one meaning, namely, born in lawful wedlock. Now in Scotland, the child born before the marriage ceremony is performed is legitimate, not because of a subsequent act of his parents, but because he is considered as born in lawful wedlock. The marriage is held to have preceded his birth; and according to the doctrine and language of the civil law, from which Scotland and many other countries borrowed this principle, he is considered as *non legitimatus sed legitimus ab initio*. Nor is this a mere fiction of law, or a technical refinement; marriage in Scotland is a consensual contract, and effected by consent alone. But this may be given and the contract made in two ways; either *per verba de presenti*, or by a promise *subsequente copula*. Now in the latter case the *copula* makes the previous promise a consent; it turns the promise touching the future into a present consent; a child then, born in the interval between the promise and the *copula*, would be legitimate clearly; for the *copula* would show that consent, and therefore a marriage, had preceded his birth. But so does a marriage after the birth; for that raises a legal presumption that there was a consent before the birth, and at the cohabitation. The cohabitation is held to have been a consent and a marriage; the ceremony is only held * as evidence of that previous consent and contract. So much is this the case, that if either party was married to another at the time of the child's birth, or during the interval between that birth and the ceremony, no legitimation takes place, because no room exists for the presumption of law that the consent or marriage took place before the birth. All this is certain and clear, and yet the learned Judges appear not to have taken it into their consideration in the judgment they pronounced.

The judgment is rested entirely upon the Statute of Merton; and it is contended, that by that famous Act he is declared a bastard who is born before the marriage of his parents. No doubt so he is in England; and no doubt bastardy — the *status* of bastardy — is what the English law is there dealing with. But is this authority for saying, that he only shall inherit English lands whom that statute declares legitimate?

It is said that the *lex loci rei sitæ* must govern the succession to real estate. Undoubtedly it must; and if that law gives it in Kent to all the sons, and in Brentford to the youngest, and elsewhere to the eldest, these several sons are the heirs in those several places. But when it is said that the lawful issue shall take, I agree; I too say, the legitimate son or sons shall inherit: but to find who are the legitimate sons I must ask the law of the birthplace which fixes the *status* of legitimacy, of that personal quality which, according to Huber, travels round everywhere with the party. But the argument assumes a narrower and apparently a closer form still; for it is said that the statute declares those only inheritable who are born in marriage, and that Lord COKE accordingly defines "heir," he who is *ex justis nuptiis procreatus*. There is in this, however, a great fallacy: "born in * marriage" or not, "*ex justis nuptiis procreatus*" or * 590 not, is to be determined by some law or other. It is not a question that answers itself, and in one way only. Then what law shall determine? Certainly, either the law of the country where the party was born, or where the marriage was had; the law either of the country where the *nuptiæ* were had, or where the *procreatio* took place. A question might arise where the events happened in different countries: it might thus be doubted which law should govern; which law should be resorted to for an answer to the question: but where both events happened in the same country, as here, there seems no doubt at all in the matter. Now the law of the country where both the marriage and the birth took place declares that the party was born in lawful wedlock, that he was *ex justis nuptiis procreatus*, and wholly denies that he was born before marriage, or out of wedlock.

But it is said that this is a fiction, and that our law cannot import the fictions of a foreign system, though its principles we are allowed to import. This distinction I do not profess to comprehend. What is a fiction but a principle? It is only one particular view which the law takes, and one doctrine which it lays down. Suppose a Scotch Court were to deny the legitimacy of a child who was born the day after his parents were married in England; should we not say that a gross absurdity was committed? Should we not say the child was born in lawful wedlock, and hold the doctrine absurd which should question his being lawfully begotten? Nay, suppose a gift, in the usual terms, to the heirs of the body lawfully begotten, we should let the child born the day after the marriage take under such a gift, although it was clearly not lawfully begotten in point of fact. This is

* 591 a fiction * exactly analogous to the Scotch fiction. The Scotch law presumes, against the fact, the marriage to have been had before the birth of the child, our law presumes, against the fact, the marriage to have been had before the cohabitation of the parents. The fiction, or rather the presumption, is parcel of the legal principle in both; and there can be no reason for importing the residue of the doctrine, and rejecting the presumption; there can be no reason for importing the English law presumption into Scotland, which does not justify and require us to import the Scotch law presumption into England. It must be recollected too, that the special verdict finds, as a fact, the legitimacy of the party, and not his legitimation; it finds as a fact that he is legitimate, that is, lawfully born. Now we know this to mean, by the Scotch law, born in lawful wedlock; but the finding in the verdict is sufficient; for legitimate, as contradistinguished from legitimated, means born in lawful wedlock, and means nothing else. So in the civil law, whence this doctrine is wholly taken both in Scotland and Holland, and also in other countries, the child is *legitimus*, not *legitimatus*; as, in the same system of jurisprudence, *liber* and *libertus* both import a free man: *libertinus* one freed; *ingenuus* one free born; if any person were found to be *ingenuus* by an inquisition, we should contend that he never had been a slave, though a find-

ing of *liber* might leave it equivocal. In like manner, and by parity of reason, a person being found legitimate, excludes the supposition of his ever having been a bastard, and shows him to be lawfully born and begotten. Suppose a Scotch estate devolves to one born before marriage, as it might, by devise to the first son of A., I apprehend that A., marrying the mother the day after the devisor's death, the estate would be vested in the son, because he would become legitimate, though born * before the testator's death; but it * 592 is unnecessary to argue this, though it illustrates the principle, the fact found being, that the lessor of the plaintiff was born in Scotland legitimate, or in lawful wedlock. Again, if it be said that the special verdict not only finds the party to be *legitimus*, but states how, namely, by the marriage of his parents after his birth; then, I say, this reason given alters not the ultimate finding of legitimacy, that being the fact found. Suppose a verdict found the claimant of an estate to be born in lawful wedlock, adding how the wedlock was lawful, namely, the father having married under age, without consent of parents and without the publication of banns, could we on this ground deny the finding of lawful wedlock? Could we say that a marriage, which our law declares void and unlawful, had thus been found in the face of the verdict? Surely the Marriage Act is as strong to declare what makes *justæ nuptiæ*, as the 20th Henry III. to declare what makes a man heir to lands; nay, the very latter statute itself and Lord COKE's authority requiring *justæ nuptiæ*, a lawful marriage, it may just as well be argued that the verdict does not estop us to say the facts found by it amount not to such marriage, as to contend that the finding of legitimacy does not estop us in the case at bar.

The cases of *Shedden v. Patrick* or *Crawford*, and *Strathmore v. Bowes*, have been already referred to; but they require another remark: they were decided in this House by appeal, it is true, from Scotland, and respecting Scotch real estate; but still by this House, and upon general principles of law. Those cases were the precise converse of this: they decided the bastardy of parties, and on the distinct ground that, as Lord REDESDALE said, "they were bastard by the

* 593 law * of their birthplace, and therefore bastard in Scotland, where the rights claimed respected real estate." It is not more the rule of English law, that children born out of wedlock shall not inherit though their parents intermarry, than it is the rule of the Scotch law that such children shall inherit if their parents do intermarry. It is not more alien to the English law to adopt the fiction that such children are born in wedlock, than it is alien to the Scotch law to exclude this principle. The English rule being statutory can make no difference. A fixed and known principle of common law has exactly the same force as a statutory provision. How then can the opposite principle be adopted in two cases identically the same? The Court below says, that the English law gives not an estate to the bastard *eigne*, and that it treats him as bastard although by the law of his birthplace he was legitimate: the Scotch law gives the estate to the bastard *eigne*, regarding him as legitimate; and this House adjudged that he should not take that estate, only because he was illegitimate by the law of his birthplace. Your Lordships decided that the *lex loci rei sitæ* should not be regarded when it differed from the *lex loci contractûs et nativitatîs*; you decided that when the former law declared for legitimacy it should yield to the latter, which declared for bastardy. How can you be called upon here to decide that the *lex loci rei sitæ* shall not overrule the other law, and that again in favour of bastardy? I profess my inability to understand how these two decisions of the same question can in any way stand together, nor can I perceive that the least attention was paid in the Court below to those decisions of your Lordships.

I perceive that the whole argument in that Court turned upon a question not in dispute here, and which

* 594 * nothing but a very indistinct view of the case can raise as connected with it. The learned Judges suppose that they decide the question when they prove that the English law is to govern the case, because the question relates to real property situate in England. Now undeniably the English law is to govern the case in one sense; the eldest lawful son is to succeed, but who that son is must be deter-

mined by the law of his birthplace, and by the fact found, that under that law the lessor of the plaintiff was eldest lawful son : nay, even if we take the English law to be, that the lawful son or heir is he who is born in wedlock, then we have here the fact found, and found as a fact, that in the country where he was born the party was born in wedlock. No one, it must be always borne in mind, pretends to say that the English law can in any way dispose of the whole question, admitting that the rule cited from Lord COKE, in reference to the Statute of Merton, is to govern, namely, *hæres est qui ex justis nuptiis procreatus est*, no one contends that the question, what are *justæ nuptiæ*, can be determined otherwise than by a reference to the *lex loci contractûs*, or, it may be, *loci natiuitatis*. To that foreign law, then, we must resort ; and the only question is, at what period of our inquiry this recourse shall be had ? No more need be said to show how very far from decisive of the present question that position is which alone is argued or defended by the learned Judges, namely, that the law of England must govern. It does govern, but with the aid and through the ministry of the foreign law. The reference made to the *dictum* of the Master of the Rolls, in *Brodie v. Baney*, (a) does not touch the case : all that his Honor there said was, that questions on real rights must follow * the law of the country where the land * 595 lies. This is not denied ; nor was it denied by this House, when it refused to consider Mr. Shedden or Mr. Bowes as legitimate in respect to Scotch estates, although the law of Scotland, where these estates lay, held them both to be so, or rather would so have held had they been born in Scotland. But while this House and the Court of Session admitted that the Scotch law must decide, they also held that the Scotch law refused estates to bastards, and that it awarded one to be a bastard who was so by the law of his birthplace. That was the very same case as this, in every material respect.

It is not easy in such a question — a question raised on the *conflictus legum* — to omit all consideration of convenience, inasmuch as it is principally on views of convenience that the

(a) 2 Ves. & B. 129.

whole doctrine of what is called *comitas* turns. One should say that nothing can be more pregnant with inconvenience; nay, that nothing can lead to consequences more strange in statements, than a doctrine which sets out with assuming legitimacy to be not a personal *status*, but a relation to several countries in which rights are claimed, and indeed to the nature of different rights. That a man may be bastard in one country and legitimate in another, seems of itself a strong position to affirm; but more staggering is it when it is followed up by this other, that in one and the same country he is to be regarded as bastard when he comes into one Court to claim an estate in land, and legitimate when he resorts to another to obtain personal succession; nay, that the same Court of Equity, when the real estate happens to be impressed with a trust, must view him as both bastard and legitimate in respect of a succession to the same

* 596 intestate. Further still, should he * happen to be next of kin to his uncle, who had a mortgage upon the estate, he must be denied his succession to the land of the mortgagor in his quality of bastard, and be allowed to come in as an incumbrancer upon the self-same estate in his capacity of legitimate son to the same mortgagor. All this is assumed to be the law by the learned Judges who have decided below and advised your Lordships here. They have not assumed, however, what they cannot deny, that it is another consequence of their doctrine, to enable a descendant of this same bastard to claim through him as if he were legitimate, while the alleged force of the Statute of Merton, and of Lord COKE's commentary thereupon, excludes him from taking it himself. In the same country, in the same Courts, in respect of the same land, he is both bastard and legitimate; bastard for the purpose of his own succession, legitimate when the succession of others is concerned.

May I be permitted most respectfully to express a doubt, whether or not this question has received all the consideration due at the hands of those learned Judges, and whether they have not dealt with it a little too easily; made somewhat too light of it. I know not that it carries the argument much further, but there is a proceeding well known to your Lord-

ships, sitting here as a Court of general jurisdiction over the whole United Kingdom, though unknown to the learned Judges of England — the process of declarator. Suppose a process of declarator of legitimacy had been brought in the Scotch Courts by the lessor of this plaintiff, the judgment would have been, and quite as a matter of course, that he was the lawful son of Alexander Birtwhistle ; and to this suit the present defendant being made a party, the judgment could be given in evidence before the Court where the ejectment * was brought. I agree that such a judgment * 597 does not conclusively bind, yet it would place the conflict of the two laws in a somewhat strong light to observe that, with this judgment before them of a competent Scotch Court, — the Court of the country, the English Court, should pronounce him bastard, when the Scotch Court had pronounced him lawful son ; but if both judgments were brought here by appeal and writ of error, as might easily happen, your Lordships would be compelled to affirm the sentence of the Scotch Court, and yet you are now asked to affirm the opposite judgment of the Court of King's Bench. Let it be observed, too, that all this anomaly is in England ; it begins and ends here ; for the Scotch Courts have decided in such cases with perfect consistency, as well as entire uniformity. Those very learned persons, whose familiarity with legal principle, in its enlarged sense, is derived from a deep study of the feudal and of the civil law, as well as of the modern jurisprudence of Scotland, have been guided in all their determinations of such questions by simple, rational, and intelligible principles. If a declarator of legitimacy were brought before them by one born in England before marriage, and whose parents afterwards intermarried, their sentence would be that he was illegitimate ; and even were he to claim a Scotch estate, the law would be the same. This has been ruled in Scotland, in the cases more than once referred to, and affirmed upon appeal here. But your Lordships are now advised to take a different course, when the same question arises in another part of the kingdom. It may be observed, that in referring to those Scotch cases the learned Chief Justice says, without discussing them, that it is satisfactory

to him that the form of the proceeding (a special
* 598 verdict) was * such as to carry the question before the same tribunal which pronounced the decisions in *Shedden v. Patrick* and *Strathmore v. Bowes*. In the advice, however, which has been given to this tribunal by the same learned Judges, I do not find that those decisions have been much, if at all considered.

Entertaining a very strong opinion that this case was wrongly decided in the Court below, and upon imperfect views of the question — views which, losing sight of the real point, and proceeding on one very easy and quite undisputed, left the real question undetermined, — with the greatest respect for the learned Judges, who gave the same opinion to your Lordships which had been given in the Court below, and proceeding on the same grounds, I am bound to give my own opinion, although it differs so widely from theirs. I think, with a view to the uniformity of your Lordships' decisions, particularly with reference to the cases to which I have adverted, it is desirable that this case should undergo a further consideration before it is finally decided; and I humbly submit these observations to the consideration of your Lordships, and more particularly of my noble and learned friend who held the Great Seal at the time, and heard the cause argued.

LORD LYNDHURST. — My Lords, this was a case which arose on the Northern Circuit. For the purpose of raising the question of law for the opinion of the Court of King's Bench, the parties agreed on a special verdict. The question was argued originally at great length, and with great learning, by the present Lord Chief Justice of the Common Pleas, on the one side, and by counsel of great eminence on the other, and the Judges of the Court of King's Bench
* 599 were unanimous in their * opinion upon the case; however, in consequence of the importance of the question, at the suggestion of the Lord Chief Justice at the time, it was thought right to bring the question to your Lordships' House. It was again argued, with great learning, at your

Lordships' bar, by my noble and learned friend on the one side, and, I think, *Dr. Lushington* on the other. It was very elaborately argued, and the learned Judges unanimously concurred in the decision of the Court of King's Bench. However, my noble and learned friend has stated a doubt with respect to the case: he is of opinion that all the necessary views of the subject were not taken in the argument, and that they were not sufficiently considered by the learned Judges at the time of giving their advice to your Lordships. Under these circumstances I agree with my noble and learned friend, that with a view to settling the law upon this subject, and with reference also to the importance of the question, it might be desirable that the case should again be argued by counsel at the bar, in such a way as your Lordships shall direct, in the presence of the learned Judges: that, of course, must be in the next session, as it will be impossible to call them together this session. I must say that some of the views put by my noble and learned friend are very striking: I have adverted to them myself, over and over again, in considering the case; they require very full and patient consideration, and no pains should be spared to arrive at the proper result: therefore I should suggest the course which I believe my noble and learned friend approves, that your Lordships should request the learned Judges to attend here to hear the case reargued.

LORD BROUGHAM. — My Lords, I am much better pleased that my noble and learned friend should put * it * 600 as he has done, on his having considered those points as worth consideration, than that it should proceed on any doubts being entertained by me. I should not think it right that I, who was not judicially here when it was heard, should advise your Lordships.

LORD DENMAN. — My Lords, I too think the importance of the case is such, and the doubts which exist are so considerable, that they ought to be further investigated before the case is determined by your Lordships.

Ordered to be further argued before the Judges next session.

Some doubt being entertained whether the parties may think fit again to bring this case under consideration, and some delay being at all events necessary before a final decision can be given, it has been judged advisable to print these observations of the noble and learned Lords, on the opinion delivered by the Lord Chief Baron, on behalf of the Judges, in 1830.

* 601

* APPEAL

FROM THE COURT OF CHANCERY.

NEWDIGATE *v.* NEWDIGATE.

1834.

| | | |
|--|---|---------------------------------|
| CHARLES NEWDIGATE NEWDIGATE, CHARLES NEWDIGATE, an Infant, by the said CHARLES NEWDIGATE NEWDIGATE, his Father and next Friend, and EDWARD MILLAR MUNDY | } | <i>Appellants.</i> |
| FRANCIS NEWDIGATE | | <i>Respondent.</i> ¹ |

Will, Construction of. Timber.

Where A. was tenant for life without impeachment of waste, except as to "the timber growing in the park, avenues, demesne lands, and woods adjoining to the capital messuage," and cut timber in woods not precisely answering that description, but which were an ornament or shelter to the messuage : *held*, that he was guilty of equitable waste, and an account was directed, and an injunction granted.

If there be an accidental omission of form in the drawing up of a decree in the Vice-Chancellor's Court, and that decree be appealed against, the Lord Chancellor may supply the omission.

SIR ROGER NEWDIGATE, late of Arbury, in the county of Warwick, being seised of, or otherwise entitled in fee-simple or in demesne as of fee to large real estates in the said county, made his will on the 30th of October, 1800, duly attested for

¹ S. C., 8 Bligh N. S. 474.

passing freehold estates, and thereby gave to the respondent all his books, pictures, &c., as heir-looms, &c., and also "all and singular his real estates, manors, freehold lands, and freehold estates in the said county * of Warwick * 602 and elsewhere (except as therein excepted), for his life, without impeachment of waste, except the timber growing in the park, avenues, demesne lands, and woods adjoining to the said capital messuage." And after the death of the respondent, to the appellant, Charles Newdigate Newdigate, for life, without impeachment of waste, and then to his sons, in tail male; with power to a tenant for life in possession, to settle a limited estate by way of jointure, and to let leases for twenty-one years.

The testator died on the 6th day of November, 1806.

The respondent then entered into the possession of the estates devised; and on the 26th day of June, 1824, the appellants, claiming to be entitled to the inheritance of the estates, filed their bill in Chancery against the respondent; and after setting forth amongst other things the will of Sir Roger Newdigate, and his death, and the interest of the appellants, stated, that the estates in the county of Warwick devised by Sir Roger Newdigate, consisted of a mansion-house called Arbury, and a mansion-house called Astley Castle, and about 5650 acres of land thereto adjoining, and that the park belonging to the mansion-house called Arbury contained 300 acres; and that the lands held in hand, together with the park and woods in hand, consisted of 800 acres, and were part of the demesne lands; that there were several woods which lay intermixed with and were part of the demesne lands, two of which were called Spring Kidden Wood and Seaswood; that in Spring Kidden Wood there was an avenue, forming the only communication from the mansion-house of Arbury, to the North Lodge, which opened on the high road; that there was another wood, *called Hawkeswood, and a small wood adjoining; that * 603 there was an avenue leading through the two last-mentioned woods, communicating on one side with the road leading to Arbury, and on the other with Astley Castle; that there were also certain farms, part of the demesne lands,

called Dencher's or Horner's Farm, and Temple House Farm; that the respondent had felled timber in the park, &c., adjoining Arbury mansion-house, and in particular in the wood called Seaswood, and in the wood called Spring Kidden Wood, and the private towing-path adjoining; that he had felled all the timber in Hawkeswood, and in the small wood adjoining, to the value of 2000*l.*; that he had felled timber in the south avenue in the park, and on the farm called Dencher's Farm; that he had cut trees on Temple House Farm; that he had cut down timber and other trees upon every part of the estate, many of which were or were intended to be ornamental, or afforded shelter to the mansion-house of Arbury, and also many intended to be ornamental, or to afford shelter to the mansion-house called Astley Castle.

The appellants insisted, that the respondent ought to account for the timber and produce thereof, and charged that the parts of the devised estates in the bill mentioned to be excepted, were by the said testator's will expressly excepted from being cut by the respondent during his life, and that the timber which the respondent cut or caused to be cut down from such parts was timber growing in the park, avenues, demesne lands, and woods, adjoining the capital mansion-house called Arbury; and the bill prayed for an account, and for an injunction to restrain the respondent from

* 604 further cutting down * the timber on the estate. The appellants obtained an injunction to the effect prayed by the bill.

The respondent, in December, 1824, put in his answer, stating, that the estates consisted of a mansion-house called Arbury, and 5368 acres of land, the whole whereof, except about 245 acres, lay together, but that the house called Astley Castle never was considered to be a mansion-house, it having been for many years a ruinous and uninhabitable building, until Sir Roger Newdigate repaired a small part thereof, and that it was at the time of his death let together with the garden to a tenant, for 10*l.* per annum, which rent being considered the fair value thereof, the respondent continued to receive until the year 1808, when the respondent in a great measure rebuilt the same, at an expense of 4000*l.* and up-

wards, as a residence for Colonel Francis Newdigate, his son ; that the park contained 296 acres, the whole whereof, except 25 acres, were demesne lands ; that this park was divided from the mansion-house called Arbury, by pools of water and pleasure-grounds ; that the demesne lands contained above 900 acres, and were described in an ancient map, indorsed in the handwriting of Sir Roger Newdigate, " Arbury Demesne Park and Manor Griffe." The answer set out the description of this park at full length, and then alleged, that a part of Scug Grove was the only wood that lay intermixed with the demesne lands ; that the only woods adjoining the demesne lands were the Alders, Coventry Wood, Fir Grove, and the Ash Plantation, which last was cut periodically as underwood ; that the lands held in hand by Sir Roger Newdigate consisted of 794 acres and all the woods except Seaswood, which was at that time let to a tenant ; that Seaswood did not form any * part of demesne lands, and that no woods * 605 save Spring Kidden Wood, Park Wood, and part of Scug Grove, were demesne woods : he admitted that there was an avenue as described in the will, in Spring Kidden Wood, but denied that there was one in Hawkeswood.

In a first schedule, the respondent set forth an account of all timber felled in the park, avenues, demesne lands, and woods adjoining the capital mansion called Arbury, and for which he submitted to account as the Court should direct ; stating, however, that the trees were cut for repairs, or because they were past their maturity, or were detrimental to the tenants occupying the land, and in forgetfulness of the restrictions as to cutting timber on the demesne lands. In two other schedules, he gave an account of all timber felled, and to which he claimed to be entitled, and he denied generally having committed waste.

The appellants filed a replication. Witnesses were examined and cross-examined on the part of the appellant, and on the part of the respondent. The cause was heard on the 25th November, 1826, before Sir JOHN LEACH, then Vice-Chancellor, when his Honor expressed his opinion, that Seaswood was not within the exception in the will, and that there was no evidence that equitable waste had been com-

mitted therein. (a) The decree made by his Honor, after delivering his judgment on the case, bore date on the same day, and it was thereby declared, that "except the timber growing in the park, avenues, demesne lands, and woods adjoining to the capital messuage called Arbury, in the said county of Warwick," the words "demesne lands" denoted the lands comprised in a map exhibited in the cause;

* 606 and the * words "woods adjoining to the capital messuage called Arbury," with the word "avenues," included the words after mentioned, viz. Birch Wood, Alders Wood, Coventry Wood, the Ash Plantation, Great Hawkeswood and Little Hawkeswood, and all other woods or timber trees through or by which the road and avenues leading from the North Lodge towards the capital messuage called Arbury, or the roads or avenues leading from Astley Lodge, or Griffie Lodge, to the said capital messuage, respectively passed at the time of the death of the said testator: And it was ordered, that the injunction granted in the cause to restrain the respondent from cutting down or felling the timber on the said estates should be continued as to the timber growing in the park, avenues, demesne lands, and woods adjoining to the said capital messuage called Arbury, and including therein the woods already mentioned, and all other woods and timber trees through or by which the road and avenues leading from the North Lodge towards the capital messuage called Arbury, or the roads or avenues leading from Astley Lodge or Griffie Lodge towards the said capital messuage, respectively passed at the time of the death of the said testator." The Master was directed to take an account of all timber felled by respondent thereon, and to make a separate report as to costs.

The bill was not in form dismissed, so far as it sought to charge the respondent on account of the trees cut down in other parts, besides those declared by the decree to be within the exception in the will.

On 3d July, 1827, the appellants filed another bill against respondent, for an account of the timber felled by respondent in Seaswood and on Temple House Farm, as having

(a) See the report of the case, 1 Sim. 131.

been planted and left standing *for ornament and * 607 shelter to the mansion-house of Arbury.

The respondent appeared to the bill, and put in a plea of a former suit depending for the same matter; and on the 18th November, 1829, the plea was overruled by the present Vice-Chancellor.

On the 14th January, 1830, the respondent presented his petition to the Lord Chancellor to rehear the cause, and to supply the omission in the decree of the Vice-Chancellor, by dismissing the bill of the appellants, so far as the same sought for an account other than the account directed by the said decree.

On the 25th January, 1831, the petition was heard before Lord BROUGHAM, then Lord Chancellor; and on 31st January, 1832, an order was made that the decree of the 25th November, 1826, should be varied, that the original bill, therein omitted to be dismissed, should be dismissed, and that the accounts should only be taken as therein directed.

The appellants appealed against the decree of 25th November, 1826, and the decree of 31st January, 1832, so far as it had corrected and confirmed the former; the grounds of appeal being, that the appellants were entitled to the full extent of the relief sought by their bill, which ought not to have been dismissed as to any part, and that a wrong construction had been put upon the words of the will.

The Solicitor-General (Sir C. C. PEPYS), and *Mr. Jemmett*, for the appellants. — No part of this bill ought to have been dismissed. In an anonymous case, (a) the Court restrained a tenant for life without impeachment of waste, from cutting down trees in lines or avenues or ridings in a park: that case laid down the general rule on which this bill was filed. In **Jesus College v. Bloome*, (b) the bill was dismissed * 608 because it was only for an account of the value of the trees which had been cut down; but it was said that if the bill had also been for an injunction, it would have been good. It is so here. The cutting down of the timber in Seaswood is equitable waste, for that is ornamental timber. If that is

(a) 3 Atk. 215.

(b) 3 Atk. 262.

so, the appellants are entitled to what they require. In *Pulteney v. Warren*, (a) it was in effect declared, that where there was waste in respect of one tree, the party might have an account and an injunction. There is nothing to prevent the plaintiffs from maintaining the present bill. The dismissal of a bill in equity is not so unfavourable to a plaintiff as a nonsuit at law, and where a man has been nonsuited he may bring a fresh action: so also, unless the dismissal of the bill is accompanied with a special restriction, the plaintiff can at once file another bill. The decree of the Vice-Chancellor ought not to have been altered by the Lord Chancellor; the omission referred to was not a mere matter of form, to be supplied as of course. The facts of the case here have not been fully tried, nor the judgment of the Court exercised upon them: the question here is, what the testator intended by the form of exception? He meant to convey to the inheritance the timber in the woods, and that which contributed to the ornament of the property. The right of the first tenant for life to cut timber on the estate was therefore limited to certain parts of it; the limit thus assigned him the tenant for life has exceeded, and he must therefore be considered to have been guilty of committing equitable waste. There is no wish to press on the respondent; the costs may come out of the fund.

* 609 * *Sir E. Sugden* and *Mr. Bridger*, for the respondent. — The claim of equitable waste cannot be made out here, for the Vice-Chancellor did not declare that Astley Castle was a mansion-house; the woods adjoining Astley Castle were therefore not within the exception; that is the main point of the case; Seaswood is not within the description, and there was in fact no waste committed there. The proposition that the costs should come from the fund, shows that the decision of the present Master of the Rolls on this point was considered conclusive. The refusal to grant the relief to the extent prayed in the bill, was in fact a dismissal of the bill, and the omission of the formal dismissal in the decree was a mere accident, of which the appellants cannot

(a) 6 Ves. 89.

now take advantage; it was rightly supplied by the Lord Chancellor. By the practice of the Court, the dismissal of one bill is a bar to another founded on the same complaint, unless the Court makes the decree without prejudice. It was not so made here. This appeal ought to be dismissed with costs; for the respondent is brought here, not on a point of substance but of mere form.

THE LORD CHANCELLOR. — I should wish to communicate with the Master of the Rolls (Sir J. LEACH) on this subject; and also to consider whether on the evidence I am satisfied as to that part of the decision which relates to Astley Castle, and whether I can properly supply the omission in the Vice-Chancellor's decree, which would have directed a formal dismissal of the bill, if his Honor had been asked for it.

August 14.

THE LORD CHANCELLOR. — This case stood over for the consideration of one point, namely, as to supplying the omission in the Vice-Chancellor's decree. * On * 610 that point I am now satisfied. I also remain of the opinion expressed in the Court below, and of which the present Master of the Rolls, then Vice-Chancellor, was as to the other points, and I think that his decision ought to be affirmed. Thinking at first that there was some part of the case on which I might feel a doubt, I communicated with the Master of the Rolls; I showed him the notes of the argument, and submitted them to him, with my observations upon them. I received in writing from him, so far as his recollection went, a statement of his reasons, assisted as his recollection had been by the note I had furnished to him. Upon the result of the best consideration I have been able to give the case, thus assisted, I am of opinion that the judgment of the Court below ought to be affirmed, and I shall move that it be affirmed with costs not exceeding 100*l*.

Judgment affirmed accordingly.

FROM THE COURT OF CHANCERY.

TOLLEMACHE *v.* COVENTRY.

1834.

LADY LAURA TOLLEMACHE *Appellant.*
 The EARL and COUNTESS of COVENTRY . . . *Respondents.*¹

Will. Construction. Gift of Chattels to go with a Title.

Vere, Lord Vere, bequeathed certain chattels to trustees, in trust for his wife for life, and after her decease for his son for life, and after the decease of the survivor of them, in trust for such person as should from time to time be Lord Vere; it being his will and intention that the same should, after the decease of his wife, go and be held with the title of the family, as far as the rules of law and equity would permit. The testator left his wife and son surviving him, and also two sons of his son. After the death of the wife and son, the eldest grandson succeeded to the title and to the enjoyment of the chattels, and died, leaving an only son, who then succeeded to the title, and died an infant and unmarried, leaving the second grandson of the testator surviving him. *Held*, by the Lords, reversing a decree of the Court below, that the chattels vested absolutely in the eldest grandson, on succeeding to the title.²

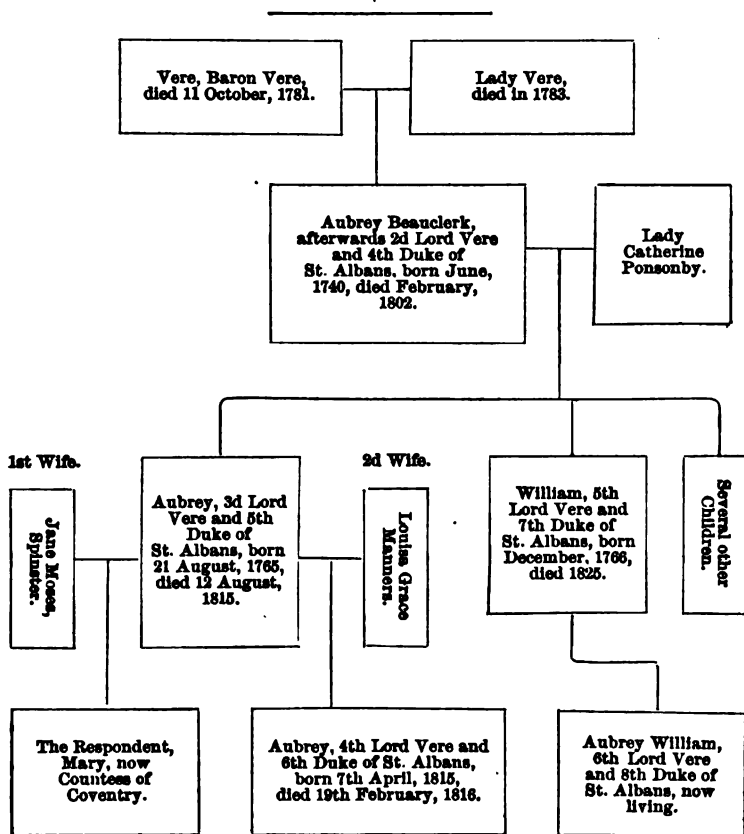
July 8, 9, August 15.

* 612 * VERE LORD VERE, by his will, bearing date the 15th of March, 1781 (among other things), gave and bequeathed as follows: "I give and bequeath unto James, Earl of Abercorn, Robert Drummond, and Thomas Walley Partington all the household goods, furniture, pictures, books, linen, china, and glass which shall at the time of my decease be at my mansion-house of Hanworth, in the county of Middlesex, or in any of the offices belonging to the same ;

¹ S. C., 8 Bligh N. S. 547.

² See *Dungannon v. Smith*, 12 Cl. & Fin. 546, 566; *Gosling v. Gosling*, 1 De G., J. & S. 1; affirmed on appeal, *nom. Christie v. Gosling*, L. R. 1 H. L. 279; *Harrington v. Harrington*, L. R. 3 Ch. App. 564; *Shelley v. Shelley*, L. R. 6 Eq. 540; *Audsley v. Horn*, 1 De G., F. & J. 236; *Earl of Tyrone v. Marquis of Waterford*, 1 De G., F. & J. 613.

and also all such silver and gilt plate as I shall be possessed of at the time of my decease, whether the same shall be at Hanworth or in London, and in both places respectively; upon this special trust and confidence nevertheless, that they the said James Earl of Abercorn, Robert Drummond, and Thomas Walley Partington, and the survivors and survivor of them, and the executors and administrators of such survivor, do and shall permit and suffer my wife, Mary, Lady Vere, to have the use and enjoyment of the same goods, furniture, pictures, books, linen, china, glass, and plate, for and during the term of her natural life; and from and immediately after her decease, upon trust to permit and suffer my son Aubrey Beauclerk to have the use and enjoy-



ment of the same goods, furniture, pictures, books, linen, china, glass, and plate, for and during the term of his natural life; and from and immediately after the decease of the survivor of my said wife and son, it is my will, and I do hereby direct that they my said trustees, and the survivors and survivor of them, and the executors and administrators of such survivor, do and shall be possessed of the same goods, furniture, pictures, books, linen, china, glass, and plate, in trust for such person as shall from time to time be Lord Vere; it being my will and intention, and my sole motive for making this disposition, that the same goods, furni-
 * 618 ture, pictures, books, linen, china, glass, and * plate, shall after the decease of my said wife, from time to time go and be held and enjoyed with the title of the family, as far as the rules of law and equity will permit." And he appointed his said wife, Mary, Lady Vere, and Lord Charles Spencer, his executors, and died in October, 1781, leaving Lady Vere his widow, and his son Aubrey Beauclerk, and his two grandsons, Aubrey and William, sons of the said Aubrey Beauclerk, and all of them in his will named, him surviving.

The executors proved the will, and they afterwards assigned to the said James Earl of Abercorn, R. Drummond, and T. W. Partington, the household goods, furniture, pictures, plate, linen, china, glass, and other things so bequeathed to them in trust as aforesaid. Robert Drummond having survived his co-trustees, died in or about the year 1806, having by his will appointed his sons Andrew Berkeley Drummond, John Drummond, and Charles Drummond, executors, who duly proved the same, and became his personal representatives, and trustees of the said furniture, pictures, books, plate, &c.

Upon the death of Vere Lord Vere, the title of Lord Vere descended upon his son Aubrey Beauclerk, who was second Lord Vere, and afterwards became fourth Duke of Saint Albans. He survived the Lady Vere his mother, and died in February, 1802, leaving Aubrey his eldest son, — who thereupon became third Lord Vere and fifth Duke of Saint Albans, — William his second son, and other children.

Aubrey third Lord Vere and fifth Duke of Saint Albans, intermarried first with Jane Moses, spinster, by whom he had issue the respondent, Mary, Countess of Coventry; and secondly, with Louisa Grace Manners, spinster, by whom he had issue Aubrey, who upon his father's death in 1815, became fourth Lord Vere and sixth * Duke of Saint * 614 Albans, and died an infant, in February, 1816. Upon the death of the infant, William his uncle became fifth Lord Vere and seventh Duke of Saint Albans; and upon his death in 1825, Aubrey William, now Duke of Saint Albans, succeeded to both his titles. Aubrey the second Lord, and Aubrey the third Lord Vere, were both living at the death of Vere Lord Vere, the testator. Aubrey the fourth and infant lord and duke, was born long after the testator's death.

Mary, Lady Vere, died in the year 1783. The chattels bequeathed by Lord Vere's will were enjoyed by her during her life; and after her death, by Aubrey the son and Aubrey the grandson, in succession, during their lives. This last Aubrey, third Lord Vere and fifth Duke of Saint Albans, by his will, dated the 18th July, 1814, gave the residue of his personal estate to his wife, Louisa Grace, Duchess of Saint Albans, and appointed her sole executrix; and died in August, 1815, leaving the duchess and his two children (viz.) Lady Coventry, his only child by his first wife, and Aubrey the fourth and infant lord and duke, his only child by his second wife, surviving him.

After the death of Aubrey, the third lord and fifth duke, a bill was filed in Chancery, by Aubrey his infant son, then fourth Lord Vere and sixth Duke of Saint Albans (by his next friend), against Louisa Grace the Duchess, his mother, the said Andrew Berkeley Drummond, and others, by which the infant lord and duke claimed to be absolutely entitled to the furniture, pictures, &c., bequeathed by the will of Vere Lord Vere as aforesaid, and prayed that an account thereof might be taken under the decree and direction of the Court; but before the defendants had put in their answers, the plaintiff died an infant, aged ten months and a few days.

* Louisa Grace, Duchess of Saint Albans, survived * 615

the said infant plaintiff, and died, having by her will, dated the 28th of November, 1815, bequeathed the residue of her personal estate to her sister, Lady Laura Tollemache, the appellant, and appointed her sole executrix. This will Lady Laura proved in the Prerogative Court of Canterbury, and also took out letters of administration to Aubrey the third lord and fifth duke, with his will annexed, and became his sole legal personal representative.

In Trinity term, 1818, the respondents, George William Coventry, then commonly called Viscount Deerhurst, now Earl of Coventry, and the said Mary, now Countess of Coventry, then called Lady Mary Deerhurst, his wife (who had taken out letters of administration of the goods and chattels of the said infant duke, her half brother), filed their bill of revivor and supplement against the said Andrew Berkeley Drummond, John Drummond, and Charles Drummond, the appellant, Lady Laura Tollemache, William then Duke of Saint Albans, and others (whose names were afterwards struck out by amendment), claiming to be absolutely entitled in right of the countess (as representative of the said infant duke), to the furniture, plate, pictures, &c., mentioned in Vere Lord Vere's will.

William, fifth Lord Vere and seventh Duke of Saint Albans, by his answer claimed, as tenant in tail in possession of the barony of Vere, to be entitled under and by virtue of the said will to the said goods, furniture, pictures, &c.

Lady Laura Tollemache, by her answer, stated, that in the year 1795, the household furniture, linen, china, and glass, and some of the pictures bequeathed by the will of Vere Lord

Vere, had been sold, and the proceeds thereof invested * 616 in securities bearing interest, * and which then amounted to 92*l.* 6*s.* 5*d.* four per cent annuities; and that some of the said pictures had been destroyed by a fire which happened at Hanworth House, the residence of Aubrey, the second Lord Vere, and afterwards Duke of Saint Albans: and submitted that the late infant plaintiff, Aubrey the fourth Lord Vere and sixth Duke of Saint Albans, did not, upon his father's death, become absolutely entitled to the said chattels, but that the same had vested in his father, the preceding duke (being the third lord), as his absolute

property, and then belonged to Lady Laura, as his personal representative.

The cause came on to be heard before the Vice-Chancellor, in 1820, when his Honor declared and decreed, amongst other things, that Lady Mary Deerhurst, now Countess of Coventry (as administratrix of the late infant lord and duke), was absolutely entitled to the said goods, furniture, pictures, &c., and decreed accounts to be taken of the same, &c. (a)

William, the then Duke of Saint Albans, and Lady Laura Tollemache, severally appealed to the Lord Chancellor. Before the appeals were heard the late Duke William died, whereupon the title of Lord Vere descended upon the present duke, and he and the executors of his father were made parties to the suit, by bill of revivor. The appeals were heard before Lord ELDON, and subsequently before Lord LYNTHURST, who, in November, 1830, gave his judgment, and ordered the said decree to be affirmed.

Lady Laura Tollemache now appealed to the House of Lords against so much of the decree as declared Lady Coventry to be absolutely entitled to the chattels in question.

* *The Solicitor-General* (Sir C. C. PEPPYS), and *Mr. Preston*, for the appellant. — The gift was to a class of persons in succession, viz., Lords Vere, and not to individuals. The executory bequest of the chattels to the person who should be first taker of the title of Lord Vere, after the death of the survivor of the testator's widow and son, was a bequest which must of necessity vest, if it ever vested, in some person who either was in existence at the time of the testator's death, or would come into existence within the compass of a life in being at that time, or within a few months after the dropping of such life; and was therefore good in law. But the executory bequest over to the person who would be Lord Vere next in succession after such first taker of the title, was not a bequest which must of necessity vest in any person who would be in existence at the testator's death, or within any life then in being, or twenty-one years after the

(a) See a full report of the case, under the title of *Lord Deerhurst and others v. Duke of St. Albans and others*, 5 Madd. 232.

dropping of any such life ; and therefore was not valid. The executory bequest to the person who should be first taker of the title of Lord Vere at the time of the death of the survivor of the testator's widow and son, not being a bequest which must of necessity vest in a person living at the testator's death, no gift over upon the death of that person could, by the rules of law, be good and valid, unless expressly made in favour of some person who must of necessity be in existence, either at the testator's death, or within the compass of some specified life then in being, or twenty-one years after the dropping of such life. The testator might have taken the lives of one or more person or persons in existence at his death, and twenty-one years after the dropping of the last of such lives, to form a period within which an executory bequest of the chattels might have vested ; yet, as he omitted

to do so, it was not in the power of the Court to supply * 618 * that omission ; one reason for which is, that, as the testator would have had all the world to choose his lives out of, it is impossible to say what lives he would have taken ; and another reason is, that executory devise, being an infringement on the rules of the common law, has only been allowed on condition of its not exceeding certain limits : *Robinson v. Leake* ; (a) namely, on condition that it be so framed as that it must vest, if at all, within a certain period ; but if that period is not expressly defined in the will, this condition is not performed. The trust not being executory, nor connected with any devise or settlement of real estates, by way of strict settlement, the words " as far as the rules of law and equity will permit " cannot operate to make the bequests valid to a greater extent than they would be without those words, or allow of the addition of any modification of ownership not expressed in the gift.

Mr. Tinney and *Mr. Romilly*, for the respondents. — There were three several claimants to these chattels in the Courts below : first, the appellant, as the personal representative of Aubrey, the third Lord Vere ; secondly, the personal representatives of the infant Lord Vere and Duke of Saint Albans,

(a) 2 Meriv. 390.

who are the respondents in this appeal; and third, the late Lord Vere, William Duke of Saint Albans, on whose death, his representatives, together with the present duke, were made parties to the suit, but they have not joined in the appeal. The question, therefore, is now between the appellant and respondents. The will directed the chattels to go with the title, as far as the rules of law and equity would permit. Aubrey, the third Lord Vere, and first grandson of the testator, being *in esse* * at the date of the * 619 will and death of the testator, must be considered as tenant for life only; and his son, the great-grandson of the testator, was the first tenant in tail of the dignity, and in him therefore these chattels vested absolutely. To construe the will differently, and hold them to vest in the grandson, the third Lord, would be tantamount to the striking out of the words "in trust for such person, &c., as far as the rules of law, &c., would permit." There was no ground in this case for supposing that the period of the suspension of the absolute vesting would exceed the time allowed by the rules of law, if that period were extended to the great-grandson not born at the date of the will, as there never could be any interval in the succession of Lords Vere.

The above is a mere outline of the arguments. They are so fully reported, on the hearing before the Vice-Chancellor, in 5th Maddock, 232, where the case also is stated more at large, and on other points which were not now in dispute, that the reporters did not think themselves justified in repeating them. Among the cases cited, besides those mentioned in the judgment, were, *Gower v. Grosvenor*; (a) *Trafford v. Trafford*; (b) *Foley v. Burrell*; (c) *Bridgewater v. Egerton*; (d) *Vaughan v. Burslem*; (e) *Carr v. Lord Errol*; (g) *Gee v. Lord Audley*; (h) *Humberstone v. Humber-*

(a) Barnard. 54; S. C., 5 Madd. 337.

(b) 3 Atk. 347.

(c) 1 Bro. C. C. 247, and 4 Bro. P. C. 319.

(d) 1 Bro. C. C. 280; S. C., 1 Ves. Sen. 122.

(e) 8 Bro. C. C. 101.

(g) 14 Ves. 478.

(h) 1 Cox, 324.

stone; (a) *Chapman v. Browne*; (b) *Beard v. Westcott*; (c) *Blackburn v. Stables*. (d)

The Lord Chancellor observed, that the case was
 * 620 * one of considerable difficulty, not so much from any doubt about the principles of the law which were brought into discussion, for they were settled and clear enough, but the difficulty he felt was in the application of them to the very peculiar circumstances of this devise. It was to be regretted that no reasons were given for the decision to which the Court below had come. He advised their Lordships to postpone the consideration of the case.

August 15.

THE LORD CHANCELLOR.—My Lords, this was an appeal from a decree of the present Master of the Rolls, when he was Vice-Chancellor; for it was decided originally as far back as the year 1820. It turns on a question of great difficulty, and of great novelty, in the construction of a will. The will is that of the first Lord Vere, created Baron Vere, and who died in October, 1781. By that part of his will on which the question arises, he gave and bequeathed to trustees all his household goods, furniture, pictures, books, and so on, and all his plate, being in his mansion-house at Hanworth, upon trust for his wife, during her life; and after her death, to his son Aubrey Beauclerk, during his life; and after the death of the survivor of those two, who were both named, instead of giving it to any one individual by name, or to any number of individuals by name, and to their first and other sons,—which would have carried estates for life first to the persons named, and afterwards an absolute interest, being personalty, to the unborn issue of the taker of the last life-estate,—instead of doing that, he, for the purpose of going as near as the law would permit him to create a perpetuity, adopted
 a course which has given rise to all this difficulty;
 * 621 * he has given this part of his personal property in trust for such persons as should from time to time

(a) 1 P. Wms. 332.

(b) 3 Burr. 1626.

(c) 5 Taunt. 392.

(d) 2 Ves. & Bea. 367.

be Lord Vere; it being his will and intention and sole motive for making this disposition, that the same goods, furniture, pictures, and so forth, after the decease of his wife and son, should from time to time go and "be held and enjoyed with the title of the family, as far as the rules of law and equity will permit." He left his said son, and also his widow, Lady Vere, surviving him; Lady Vere took this personalty by force of the first limitation; and the son surviving her, took after her by force of the second limitation; and then the lordship of Vere went to his son Aubrey, the third Lord Vere, fifth Duke of Saint Albans, who died in 1815, having married, for his first wife, Jane Moses, and for his second wife, Louisa Grace Manners. By the first marriage he had issue the respondent, Mary, Countess of Coventry; by his second he had issue Aubrey, the fourth Lord Vere and sixth Duke of Saint Albans, who was born in 1815, and died in February, 1816, a few months old, leaving as representing him by administration, Lady Coventry, his sister of the half-blood. She and Lord Coventry, in her right, are the respondents who have obtained the decision of the Court below. Louisa Grace Manners, the then Duchess of Saint Albans, was made executrix of the will of her husband, the third Lord Vere; and Lady Laura Tollemache, as her executrix and personal representative, is the appellant, and claims under Aubrey, the third Lord Vere, of whom also she is personal representative.

It is manifest that Lady Laura Tollemache must prevail, if Aubrey, third Lord Vere, took, under * the * 622 limitation of the will, an absolute interest in this personalty: she represents his executrix, being the executrix of that executrix. It is equally clear that if Aubrey, the fourth Lord Vere, took an absolute estate, then Lady Coventry, as representing him, takes an absolute interest in this personalty. It is also clear that Aubrey, the fourth Lord Vere, took that absolute interest, if the gift was by limitation over to "Lord Vere" such as to carry an estate for life only to Aubrey, the third Lord Vere, he being *in esse* at the date of the will and at the death of the testator; and consequently his first unborn son would take an absolute interest. The question, therefore, resolves itself into this, whether or not

the testator has done that which the rules of law permit, when he made a limitation,—not to a series of persons *in esse*, and to the survivor of them, and to the first and other sons of that survivor,—but a limitation to one person *in esse* by name as purchaser, with remainder to all persons who “from time to time should successively become Lord Vere, as far as the rules of law and equity would permit;” from which last limitation this implication is sought to be raised, that the first unborn issue of the last person answering the description of Lord Vere, and *in esse* at the time of the will and the death of the testator, should, according to the analogy of the rules of law, take an absolute interest, the prior taker only taking an estate for life.

My Lords, that is a question of difficulty, and undoubtedly without precedent; for the three cases which have been referred to, when examined, throw upon it but a faint glimmering of light, if indeed they throw any light at all * 623 on it; and I am bound to say, * with respect to the case of *The Duke of Newcastle v. The Countess of Lincoln*, (a) that although there may be somewhat of a principle there laid down which has a remote bearing upon this question, yet it carries you hardly a step on the way in deciding the present case. With regard to the case of *Robinson v. Leake*, (b) much relied on by the appellant's counsel, there is doctrine there laid down which no man can dissent from, and which is indeed equally admitted by the respondents; I mean what Sir WILLIAM GRANT says in the passage cited for the appellant and relied on in the argument. As to the case of *Proctor v. The Bishop of Bath and Wells*, (c) I am not prepared to deny that there may be in that case some bearing, or rather I should say, some analogy between the principle which governed the decision in that case, and the principle which must govern the present. But the case itself was wholly different; for it was a limitation to A. for life, and remainder to such son of B., if any, as should be educated for the church and enter into holy orders; the question arising on an advowson limited in the settlement. Now it is

(a) 3 Ves. Jr. 387, and 12 Ves. 218.

(b) 2 Meriv. 363.

(c) 2 H. Bl. 358.

perfectly clear, that by law you cannot limit to any person any interest of any kind, which should go nearer to a perpetuity than the life or lives *in esse* and twenty-one years, and the period of gestation, which is a few months; and although the late decision in the case of *Cadell v. Palmer*, (a) in which your Lordships were assisted by the Judges, carries the principle to the full length, — a principle undoubtedly repugnant to the original grounds of the rule, but adopted in conformity with decisions of an old date, and with the general understanding and practice * of the profession; * 624 — yet in laying down that principle, when your Lordships held that a man may add the term of twenty-one years, as it were in gross, to the life or lives, and the survivor of the lives, in being, without any regard to infancy, or any other circumstance, you at the same time held that he cannot add any number of months to that term in gross — thus excluding the time added for gestation, unless the fact exists, and in so far recurring to the original grounds of the rule. It has been said that *Cadell v. Palmer* went further than the former cases; it went in my opinion no further than at least one case of great authority, and decided in this House, though it may have gone further than the original reason of the rule authorized; it laid down this for law, and no more, that you may add to a life or lives in being the period of twenty-one years in gross; but on this point your Lordships said, after consulting the Judges, that you may not add any period for gestation, except where gestation actually happens.

That case is totally different in principle, and does not meet this case, and does not carry us one step further in the argument than the case of *Proctor v. The Bishop of Bath and Wells*. No man could have made a limitation to the unborn children of B., first giving the estate to A., and limiting it to the unborn issue of B., when he should be educated for the church and enter into holy orders: first, because it is too remote a contingency (that perhaps applies to this case upon principle); but secondly, which is decisive, because before the age of twenty-three he cannot be in deacon's orders, and before twenty-four he cannot be in full priest's orders.

(a) 1 Cl. & Fin. 372.

Therefore there are at least two or three years beyond what the law allows, even according to the established rule, as expounded in *Cadell v. Palmer*, of this term of twenty-

* 625 one years in gross * being added to the life or lives in being. I do not then think that the case of *Proctor v.*

The Bishop of Bath and Wells is applicable to the present case; certainly it cannot be said to rule it; almost as certainly it affords but little assistance in deciding it: and what little assistance it does give us, is in favour of the appellant, rather than of the respondents. We are, therefore, compelled to have recourse to principle; and so regarding the question, first of all, we may admit that the testator might have done successfully what he has attempted to do, if he had been minded to take another course; he might have so contrived as that every one person who successively became Lord Vere, should take a life interest, and that thus the unborn issue of the last taker should have the fee-simple, by giving him what would be an estate tail in realty, and consequently an absolute interest in personalty. All this may be admitted: he might have annexed the chattel interest to land entailed to a certain succession of heirs, in such a manner as to carry the chattels to certain of the uses of that settlement, and so to accomplish his object. We need not dispute that.

But now let us pause for one moment, and consider how difficult it is to annex chattels personal to a title, whether the title is a series of estates for life, or a series of estates of inheritance, either in fee-simple or fee-tail; a fee-simple after the manner of a Scotch entail, which amounts to fee upon fee indefinitely, only prescribing certain rules of enjoyment, certain conditions annexed, and giving a certain course of succession; a fee-tail, such as we know in England. If it is a series of estates for life, how can any one, without an Act of Parliament, annex the enjoyment of personalty to

* 626 a succession of life-estates * in a dignity? If on the other hand it is an estate in fee-tail, then from the course of the reasoning to which I have referred, annexing an estate in chattels to an estate in fee-tail, should seem to give a fee-simple to the first taker in those chattels. But here is a totally new invention, and a kind of limitation not known to

the law, treating Lord Vere as if he were a corporation with perpetual succession, — treating “Lord Vere” as if he were something known to the law, and different from a person, but were a succession of persons; and though true it is that the third Lord Vere was alive at the time of the will, and you only give to the fourth Lord Vere, his unborn issue, that which the rules of law would enable you to give if the event had happened, it does not follow because you are wise after the event, that therefore you are to put a construction on the instrument which you have no right to do, to meet that which has accidentally happened after the date of the instrument. In the next place he gives a life-estate to certain persons; he gives to Lord Vere, whoever he may be, however short he may live, or however long he may live, new estates and new successions to be enjoyed at the caprice of individuals, and to shift from one to another, following no rule or analogy, and in many respects—as I shall presently show—resting on totally different grounds from those of landed succession. The law knows what you mean, when you say a person coming *in esse*, a person continuing *in esse*, and a person ceasing to exist; a person comes *in esse* in one way alone, by being born into the world; continues *in esse* by living; ceases to exist by death; all those things are known in law, and guiding yourself by this, which is fixed *and *627 known, and referring to those familiar events, you may leave your personal chattels and real estate, by the rule of law; but a peer does not come into existence in the same way; a peer neither comes *in esse*, or continues *in esse*, or ceases to be, by any such rules, in any such way.

That, my Lords, leads me to a most material consideration in this case, as it leads me to refer to the very able argument of the learned counsel for the respondents, which impeded me for a long time in the conclusion to which I saw I must ultimately come. He said that, after all, the rule was not violated in any way, as the lordship of Vere was to go to the heirs male of the body of the first patentee, one after another, and of course there never could be any interval; that one must succeed the other, and there never could be any overstepping of the boundary of the twenty-one years. I do not

light in the authorities to guide his path. It was then argued before my noble and learned friend who immediately preceded me, Lord LYNDHURST, and he gave judgment in affirmance of the decree below, but he gave it the day of his quitting the Great Seal ; and as it was handed to the registrar without reasons, of course, in these circumstances his Lordship was very properly slow to reverse his Honor's judgment. I should probably have done the same thing, if I had felt any grave doubt on the matter. To say that I move your Lordships to reverse this judgment, with perfect confidence, and with no doubt, would be taking a liberty with the facts of the case, which its acknowledged difficulty makes me feel little disposed to do. But I am sure that I am pursuing the safest course in abiding by established rules of law, and

* 633 in showing a marked * disinclination to minister to such fanciful designs ; to aid the inventors of capricious limitations of new estates, of estates shifting and springing according to rules which are wholly unknown in the ordinary course of practice and decision, and unauthorized by any precedent. I do freely acknowledge that some of the arguments I have used, I mean particularly respecting the attainder and abeyance, would apply, not merely to the case of Aubrey the fourth Lord Vere, but in some degree to Aubrey the third Lord Vere : I felt all along the possibility of such application ; but beside its much more pointed application to the case at bar, I am bound by decision and authority in the one case ; I must run in the face of authority if I denied the third Lord Vere's right ; but I have no decision nor any authority supporting the other.

These are the reasons which have influenced me in the conclusion to which I have come ; I have the satisfaction of thinking that, after an able and learned argument at the bar, I have come to a conclusion which it did not appear possible to avoid without introducing new law ; and therefore I move your Lordships that the decree of the Court below be reversed, but without costs.

The decree was accordingly reversed.

[518]

* APPEAL

* 634

FROM THE COURT OF CHANCERY.

HOWARD v. DIGBY.

1834.

HENRY HOWARD, Esq. *Appellant.*The Right Honourable EARL DIGBY . . . *Respondent.**Husband and Wife. Arrears of Pin-money.*

The Duchess of Norfolk was entitled, under the trusts of the settlement made in contemplation of her marriage with the duke in 1771, to two annuities of 700*l.* and 800*l.*, charged by way of pin-money, upon estates to which the duke was entitled for his life. The duke received all the rents and profits of the estates, and maintained the duchess according to her rank, up to the time of his death in 1815. In 1816 the duchess was found to have been a lunatic, without lucid intervals, from 1782, and she continued so until 1820, when she died intestate. Her personal representative claimed from the personal representative of the duke, arrears of the pin-money from 1782 to 1815. *Held*, by the Lords, reversing the decree of the Court below, that the personal representative of the duke was entitled to set off any payments made by the duke in respect of the pin-money, against a claim for the arrears by the duchess during her lifetime, and that the personal representative of the duchess was not entitled to any arrears of her pin-money.¹

June 19, 21, and 30.

THIS was an appeal from a decision of the Vice-Chancellor. The appellant was the executor of Charles late Duke of Norfolk, the respondent was the personal representative of the late Dowager Duchess of Norfolk, and the suit was instituted for the purpose of recovering alleged arrears of annuities, in the nature of pin-money, secured to the duchess, by indentures of lease, release, and settlement, bearing date March, 1771, being the settlement made previously to and in contem-

¹ See *Moore v. Barber*, 11 Jur. N. S. 539; *Rowley v. Unwin*, 2 K. & J. 138, 142.

plation of the marriage of the duchess, then Miss Frances Fitzroy Scudamore, * 635 with the Duke of Norfolk, then the Honourable Charles Howard. Under and by virtue of that settlement, and in the events which happened, the duchess became entitled in 1777, to receive during the joint lives of herself, and of the duke her husband, one annuity or clear yearly rent-charge of 300*l.* out of estates of the duke, in augmentation of the pin-money secured to her out of estates of which she herself had been seised in fee-tail before her marriage; and in 1782 she became entitled to receive in like manner out of these last-mentioned estates, another yearly rent-charge of 700*l.* for her separate use for pin-money, in lieu of the yearly sum of 500*l.* theretofore payable for such pin-money, and in addition to the said yearly rent-charge of 300*l.* (The settlement is stated more at large by Mr. Simons, in his report of the case in the Court below, vol. 4, p. 588.)

Charles, Duke of Norfolk, died in December, 1815, having by his will appointed the appellant his executor, who duly proved the same, and thereby became the duke's legal personal representative. Under a commission of lunacy issued against the duchess in April, 1816, she was found to have been a lunatic, without lucid intervals, from December, 1782. By an order of the Lord Chancellor, made in August, 1817, the custody of her person and estate was granted to the respondent and two other gentlemen; and they, by another order of the Lord Chancellor, made in August, 1819, were at liberty to institute a suit for the recovery of the arrears of the said yearly rent-charges of 700*l.* and 300*l.*, from 1782, the time from which the duchess was found to have been a lunatic, to the time of the duke's death. A bill was * 636 accordingly filed * by the committee of the duchess against the appellant as the duke's executor, and others, but before any further proceedings were had, the duchess died intestate, in October, 1820, and letters of administration of her personal estate were granted to the respondent, who thereby became her legal personal representative, and as such he filed the present bill. (The interest of the committees of the duchess having been determined by her death, their bill was dismissed.)

The cause came on to be heard before the Vice-Chancellor, and his Honor, by his decree dated November, 1831, declared that all the arrears claimed (1000*l.* a year from 1782 to 1815) were due to the estate of the late duchess, and directed the appellant, admitting assets of the duke's estate, to pay the same to the respondent, with costs. (a)

That decree was the subject of this appeal.

Sir Charles Wetherell and *Sir William Horne*, for the appellant. — Our first proposition is, that a claim for arrears of pin-money has in no case been allowed to be carried farther back than a year, or at most, a year and a fraction. In one case only was the fraction added to the year: *Countess of Warwick v. Edwards*; (b) and that was by reason of the peculiarity of the circumstances, and because, as it was there said, "it made little difference." In all other cases of pin-money the account for arrears was limited to a year, and that limitation is now the rule of the Court of Chancery. *Thomas v. Bennett*, (c) *Fowler v. Fowler*, (d) *Lord Townshend v. Windham*. (e) But it is *alleged that the circum- *637 stances of the present case constitute an exception to the rule, inasmuch as the Duchess of Norfolk having been a lunatic from the year 1782, was incapable of giving a receipt for her pin-money, or of consenting that her husband might receive it for his own use, or of entering into any legal contract respecting it. Could that unfortunate circumstance, even if it were proved that the disability continued uninterrupted by lucid intervals, keep alive this claim for thirty-three years, when it is admitted that the duke maintained, during all that time, an establishment for this distinguished lady suitable to her rank, expending a sum far exceeding the annuities, in providing for her clothes, jewels, and all such other ornaments and articles of comfort or necessity as are the objects contemplated by the provision of pin-money?

The second proposition which we undertake to support is, that at all events there should be a reference to the Master

(a) See his Honor's judgment, 4 Sim. 601.

(b) 1 Eq. Cas. Abr. 140, c. 7.

(c) 2 P. Wms. 841.

(d) 3 P. Wms. 353.

(e) 2 Ves. Sen. 7.

to take an account, and the appellant ought to be at liberty to set off against this claim, the sums expended by his testator for the duchess, in supplying her with those things to which pin-money is usually applied. The decree appealed from, instead of directing such reference, ordered the payment of the accumulations of the annuities for thirty-three years, without deduction.

The Vice-Chancellor seemed by his judgment to have viewed the provision for pin-money in the marriage settlement, as if it were separate estate to the use of the wife in the ordinary sense; and his Honor further seemed to make a distinction in respect that the annuity of 700*l.* was to issue out of the lady's own property. Both these views were erroneous.

* 638 It could not make any difference in the nature of * the annuity, whether it was to issue out of what was originally the husband's estate, or out of what, before the marriage, was the wife's own estate. Pin-money should not be confounded with the wife's separate estate generally. The Vice-Chancellor was drawn into the error of confounding these different provisions by that part of the settlement, by which "it was declared and agreed that the same annuities were so limited to them (the trustees) upon trust that they should from time to time pay, apply, and dispose of the said several annuities of 500*l.* and 700*l.*, or such of them as should become due and payable by quarterly payments, under which the said trustees should become entitled to receive the same, unto such person or persons only, and for such intents and purposes only, as the said Frances Fitzroy Scudamore should by any writing or writings to be signed with her hand, from time to time, notwithstanding her coverture, direct or appoint; and in default of such direction or appointment, and in the mean time until the said Frances Fitzroy Scudamore should make any such direction or appointment, should pay the said several annuities of 500*l.* and 700*l.*, as the same should be severally had and received, or so much thereof whereof she should make no such direction or appointment, into the proper hands of the said Frances Fitzroy Scudamore, for the sole and separate use and benefit of her the said Frances Fitzroy Scudamore, exclusive of the said Charles Howard, who was

not to intermeddle therewith, nor was the same to be subject to his debts or engagements; and the receipts and discharges of the said Frances Fitzroy Scudamore, and of such persons as she should from time to time direct or appoint to receive all or part of * the said annuities or yearly rents of 500*l.* * 639 and 700*l.*, as the same should become due and payable, should be good and effectual releases and discharges." The term "pin-money" was not used in that part of the settlement, but in other parts of it the annuities were expressly named as "pin-money," and the appellant was thereby relieved from all difficulty as to the intention of the parties and the destination of the provision. It was material on that part of the case to observe, that the duke had settled on the duchess by way of jointure, 2000*l.* a year out of the Norfolk estates, and that on his death without issue, she again became entitled in possession to the rents and profits of her own estates, which were of very considerable amount. The accumulations of the excess of this large income, beyond the expenditure of the duchess, for several years before her death, fell into her personal estate for the benefit of her next of kin. These considerations would have been ingredients in the cause, if the Court below had directed a reference to the Master.

The trustees of this pin-money made no demand for arrears on the duke during his life; they well knew that the duke had expended a far larger sum on the objects of pin-money. But supposing they had filed a bill in Chancery for such alleged arrears, would not that Court have answered, "*quandiu* the lady is supplied by her husband with all that her situation requires, and she is unable to spend any more, these annuities, if raised, must be for the benefit, not of the lady, but of some unborn relative, some future next of kin: therefore you shall not be allowed to raise an accumulating fund out of the husband's property, for the purchase * of ornaments * 640 with which the lady is sufficiently supplied by the husband." Had the trustees made such a demand, the duke would have been forced, in his own defence, to take out a commission of lunacy against the duchess, and the Lord Chancellor, sitting in the matter of the lunacy, would have ordered an account to be taken by the Master of what was

expended by the duke, the establishment kept for the duchess at Holmlacy, and on such objects as are contemplated by the provision of pin-money. Was there any just reason for refusing a like account to the duke's executor, against this claim by the representative of the duchess? Had the Duke of Norfolk survived the duchess, these arrears would all belong to him; the absence of all provision in the settlement for the contingency of the lady's becoming a lunatic, most clearly shows that the parties to it never contemplated the accumulating of this fund.

That which is in this settlement called pin-money, is what the law considers the wife's actual expenditure during coverture. The only peculiarity in the provision is, that it is secured to the wife by means of trustees. If the wife be unable to spend it, on what grounds are the arrears demanded, or for what purposes is the fund to be applied, the coverture being at an end, and the wife being dead? Even during the coverture this demand could not be sustained at law, if it were there, as it is here, admitted that the husband maintained the wife in a way suitable to her rank. It is probable that the duke would not have kept up the establishment at Holmlacy were it not for the unfortunate situation of the duchess; it is certain that he in no way limited her expenses.

* 641 [THE LORD CHANCELLOR.— If a * tradesman furnishes the wife with apparel suitable to her station, and not being paid by her, brings an action against the husband, would it be an answer to the action that the husband allowed *pin-money*? Could he retain the pin-money to protect himself against the action? There are cases at common law which protect the husband if he had paid the wife's allowance, but they are cases of separate maintenance during separation. *Marshall v. Rutter. (a)*]

There is no doubt on that point; separate allowance is by contract, and so is pin-money; and if the sums agreed upon for either provision be applied by the husband to the objects

(a) 8 T. R. 546.

contemplated by the agreement, he cannot be obliged to pay it again.

The decree of the Court below was against the current of authorities ; and it was a strong proof that the Vice-Chancellor had only a confused notion of this case, when he applied in favour of the respondent those decisions which clearly supported the argument for the appellant. In *Powell v. Hankey*, (a) which was a case of property settled to the separate use of the wife, Lord MACCLESFIELD said, “ as to the case of separate maintenance, the Court took notice that the husband’s maintaining the wife barred the wife’s claim in respect thereof : so if there should be a provision for the wife’s separate use for clothes, if the husband finds those clothes, the wife’s claim will be thereby barred.” If that be incontrovertible doctrine in respect to a wife of sound mind, would it not be much stronger in favour of a husband who supplied a wife of unsound mind with all that her unfortunate situation required ? In another part of his judgment in that case, Lord MACCLESFIELD laid it down that it “ was * not mate- * 642 rial whether the allowance or maintenance money was provided out of that estate which was originally the husband’s, or out of what was the wife’s own estate,” an observation which was directly opposed to the distinction attempted to be made in behalf of the respondent in this case. The case of *Fowler v. Fowler* (b) was still more applicable, because that was a case of pin-money. Lord TALBOT there said, “ when pin-money is secured to the wife, and the husband finds her in clothes and necessaries, that is a bar to any arrears of pin-money incurred during such time. The other cases cited and much relied upon for the respondent in the argument before the Court below, were *The Attorney-General v. Parnter*, (c) and *Brodie v. Barry*. (d) Both these were cases of separate estate to the use of the wife, who was of unsound mind ; and Lord Chancellor THURLOW, making an order in the former, on the executors of the husband to account for the dividends of the wife’s estate, directed con-

(a) 2 P. Wms. 82.

(b) 3 P. Wms. 353.

(c) 3 Bro. C. C. 441; 4 Bro. C. C. 409.

(d) 2 Ves. & Bea. 36.

sideration to be had of the extraordinary expense of her maintenance by reason of her insanity. That case therefore could not be an authority for the Vice-Chancellor's decree in this case, in which his Honor refused to give any such direction.

THE LORD CHANCELLOR. — I take it to be admitted that the demand here is for arrears of pin-money. It is not denied in the argument for the appellant, that where the wife has a separate estate, and it is retained by the husband, the wife's executors are entitled to the arrears. I have taken a full note of the argument; I will communicate it to Lord ELDON, and request him to look into the case.

June 21.

* 643 * *The Solicitor-General* (Sir C. C. PEPYS), and *Mr. Stuart*, for the respondent. — We admit that this is a case of pin-money, but there is no material distinction between pin-money and other separate estate of the wife.

[THE LORD CHANCELLOR. — The decisions and practice of the Court take this distinction: they allow a claim of arrears of pin-money for a year, or a year and a fraction, but set no such limit to a claim of arrears of separate estate.]

That is a fanciful distinction: no such distinction was taken in the case of *Brodie v. Barry*, (a) by Sir SAMUEL ROMILLY, who, as counsel in support of the husband's petition for the application of part of the insane wife's separate income to her maintenance, said, "where a woman entitled to pin-money, or any other separate income, which has been received by the husband, has been maintained by him, the Court will not after her death compel him to account, but will presume an agreement between them, that maintaining her, he shall retain that income." In *Ridout v. Lewis*, (b) where the question was, whether the wife should have the arrears of her pin-money out of her deceased husband's assets, Lord HARDWICKE declared her entitled to have the arrears

(a) 2 Ves. & Bea. 36.

(b) 1 Atk. 269.

for several years raised by the trustees out of the estate which was by settlement charged with it; and there was no distinction taken between pin-money and other separate estate of the wife. No such distinction was taken in the cases of *Aston v. Aston*, (a) *Townshend v. Windham*, (b) and *Peacock v. Monk*, (c) which were cases of pin-money. In the case of the *Countess of Warwick v. Edwards*, (d) another case of pin-money, * the Court directed an * 644 account of the arrears to be carried back to the period at which there was evidence of the lady's consent to her husband's receiving the pin-money for her, and that was a year and three-quarters of a year. These cases, and all the cases on the subject of pin-money or other separate estate (for no distinction was made between them), being decided on the ground of consent or no consent on the part of the wife, must be considered as overruled if the House should reverse the Vice-Chancellor's decision in this case, in which it is impossible from the situation of the duchess to presume her consent. The law permitting a married woman to have the enjoyment of property settled to her use, as if she were a *feme sole*, will not allow her to be deprived of it, unless she precludes herself from all claim to it by some act of her own, either of contract or consent, or acquiescence which implies consent, and where there is evidence to deny the wife's acquiescence in the acts of the husband, her title to the property remains. *Parker v. Brooke*. (e) There could not be a more conclusive authority against the appellant than the case of *The Attorney-General v. Parnter*, (g) on which his counsel placed so much reliance. There the Court held the very reverse of the doctrine asserted on behalf of this appellant, but directed regard to be had, in taking the account against the husband, of the extraordinary expense to which he was put by reason of the unsoundness of mind. But could it be alleged that the Duke of Norfolk incurred greater expense in maintaining the duchess, than if she had lived with him in the full possession of * her faculties, * 645

(a) 1 Ves. Sen. 264.

(b) 2 Ves. Sen. 7.

(c) 2 Ves. Sen. 190.

(d) 1 Eq. Cas. Abr. 140.

(e) 9 Ves. 583.

(g) 3 Bro. C. C. 441; 4 Bro. C. C. 409.

and in the magnificence of the expenditure suitable to her rank?

It being admitted that the duchess was incapable from the year 1782, of consenting to the duke's retaining this separate income, if the arrears be due at all, upon what principle is the account for them sought to be restricted to one year?

[SIR CHARLES WETHERELL. — We do not admit that the respondent is entitled to have the account for even one year; there is no case in which the account for the year's arrears was allowed, except where the wife herself, and not her personal representative, sued for them.]

The bill which commenced this suit was filed in the lifetime of the duchess; if she was entitled to arrears for a year, her personal representative must be entitled to the same. It is for the appellant to show, that although the duchess was entitled to one year's arrears, she was not entitled to all the arrears from 1782 to the duke's death. Lord ELDON, in *Brodie v. Barry*, said, "it is true, that if the husband receives from the trustees her separate maintenance, the Court will not charge him (the husband) with more than one year's income; but that is upon the notion of her consent to make it a common fund for the expense of the family; and this is the case of a person incapable of consenting, and therefore not within the rule which guides the Court in those instances." To the authority of Lord ELDON in that case, the respondent might add that of Lord THURLOW, in *Attorney-General v. Parnter*, both these eminent Judges respectively using words so accurately descriptive of this case. Whether this provision for the duchess be called pin-money or separate estate, her right to it under the instrument of release and settlement * 646 was unquestionably * established, and that right could not be extinguished or barred except by her consent. That doctrine was to be collected from all the cases without exception.

The appellant finding the weight of authority against him, claims to be allowed to make a cross-demand and set-off, in respect of the duke's expenditure in the maintenance of the

duchess. Though one would not expect so extravagant a proposition, yet against that also the respondent was able to oppose the authority of Lord ELDON in *Ball v. Coutts*, (a) where he said that the alimony of the wife (separated *a mensa et thoro*) should not be deducted from her pin-money, because if she lived with the husband, she would be entitled to maintenance beyond the pin-money." The wife's separate estate was not a substitute for any thing which the husband was by law bound to supply; it was neither for clothes, nor board wages, nor support; the wife had a right to do what she pleased with it, as if she were sole, without being accountable to any one. In the late case of *Murray v. Barlee*, (b) in Chancery, it was distinctly laid down that the wife's separate estate was subject to her sole control, exempt from all other interference or authority. If a set-off were admissible against the arrears of this annuity, upon what principle was it admissible against the claim of the arrears of former years, and not admissible against the arrears of the last year? In no case was there any deduction from the last year's amount of arrears. But it was argued on behalf of the appellant, that, had a commission been issued against the duchess, and she * been found a lunatic in the duke's lifetime, * 647 the Lord Chancellor, sitting in the matter of the lunacy, would upon petition direct this fund to be applied towards the maintenance of the lunatic. That was an assumption without authority: the Lord Chancellor would make no such order, without first considering what would be best for the interest of the lunatic, and without seeing whether her husband was of sufficient ability to maintain her. That was the doctrine laid down by Lord ELDON in *Brodie v. Barry*. (c) Even in the case of an infant for whose maintenance two different funds were given, the interest of the infant was the rule to determine which was to be applied. *Foljambe v. Willoughby*. (d)

THE LORD CHANCELLOR. — Admitting that the distinction between pin-money and separate estate of the wife is very

(a) 1 Ves. & Bea. 305.

(b) 3 My. & K. 209.

(c) 2 Ves. & Bea. 39.

(d) 1 Sim. & Stu. 169.

obscure, little being found in the books upon it, and no definition being given, passing also over the argument as to what would be done had a commission been sued out, let us suppose the provision for pin-money to be 200*l.* a year, and that the husband with his own hands pays for the wife's jewelry, millinery, and ornaments, what difference can it make whether he pays it into her own hands, or gives it to her tradespeople? If he pays all, for the purposes to which the wife herself would apply it, should not he be allowed credit for what he so paid? If the Duke of Norfolk, instead of paying this annuity to the duchess, — supposing her to be of sound mind, — had paid all her tradesmen's bills with it, would it not be hard, that because she did not consent to his acts, he should pay the whole over again? It seems

* 648 * to me impossible that the decree of the Vice-Chancellor, refusing all account of what the duke expended in this way, can stand as it is now. His Honor calculated the demand against the appellant, by multiplying the annuities of 1000*l.* by the number of thirty-three years, and directed payment of the gross aggregate sum. The duchess being incapable of giving consent, satisfaction, it is true, cannot be presumed against the claim, but proof of payments actually made might be permitted as a set-off against the demand, in the case of a lunatic, as in the case of a person of sound mind.

Counsel for the respondent. — Payments were not put in issue on the pleadings. Supposing that the duke made some payments which the duchess would have made out of her separate estate, if she had been of sound mind, could he, under the circumstances, maintain a suit for recovering money so paid for articles suitable to his wife's rank and condition? If he could not, can he or his executor be allowed to set off such payments in a suit against him? The duke's representative cannot be in a better condition than the duke was to resist this demand. All the cases, on the authority of which the demand for arrears was held to be barred, proceeded on the doctrine of contract or consent, which could not have place in this case. Incapacity to enjoy the fund

could not deprive the duchess of her right to it, or confer it on any other. The duke was as much a stranger as any other person in respect of this estate, and the settlement expressly provided that he should not intermeddle with it. The trusts of the settlement were valid and subsisting during the lives of the duke and duchess; it is therefore *im- * 649 possible to hold that this provision made for her expenditure on fanciful and luxurious articles, was extinguished by her lunacy: it was not an allowance from the duke, but an inconsiderable part of the duchess's property reserved to her use, while the duke was, under the same settlement, in effect to receive during their joint lives the surplus rents and profits of her vast estates. It was not denied that he received all the rents, or that he retained this separate estate of the duchess up to the time of his death, and died possessed of it. Until the numerous decisions of Lords MACCLESFIELD, THURLOW, ROSSLYN, and ELDON, were set aside, it was impossible to deny the right of the duchess, or of her representative, to recover the whole of these arrears without deduction or set-off of any advances made by the duke for her maintenance.

Sir Charles Wetherell was going to reply —

THE LORD CHANCELLOR. — Upon one part of this case I entertain so clear an opinion differing from that of the Vice-Chancellor, that I shall advise your Lordships to dispense with a reply upon such part of the argument for the respondent as touches it, reserving to the learned counsel for the appellant, if they shall be so advised, their right to reply to the rest of the case. I regard this question as one of considerable importance, of some interest from the peculiarity of the facts, and of novelty in respect of judicial decision. It is a case of first impression; for there is no decision, there are no *dicta* even in any other case, nor is there any authority of any text-writer which can be cited, either applicable to it, or at all bearing * upon it, so as to throw any * 650 light upon the question. The main facts of the case were these: In the year 1771, Charles Duke of Norfolk, then Mr. Howard, heir apparent to Mr. Howard, of Greystoke,

in Cumberland, who was heir presumptive of Edward then Duke of Norfolk, intermarried with Miss Frances Fitzroy Scudamore, a lady of large fortune; her property in land at that time consisting of from 4000*l.* to 5000*l.* a year, in Herefordshire and other counties; her property in money amounting to 26,482*l.* The whole of that money, with the exception of such part as was necessary for her paraphernalia at the marriage, passed to the husband under the settlement made previous to the marriage. The rents and profits of the estates became his, by operation of law, during the coverture; but by the marriage settlement, there was a provision made for the separate use of the wife, to this effect; that in respect of pin-money, the recital states that it had been agreed to provide 500*l.* a year, to be afterwards increased to 700*l.* The operating part of the instrument, dropping the name of "pin-money," settled in trustees for her life (in the events there mentioned and which happened) 700*l.* a year, reserved out of the rents and profits of her estates; but as those rents and profits became the husband's, this 700*l.* was as much given by him as if it had been given out of the reversion of the Greystoke estates, in the possession of his father, which would come, and which eventually did come, to him upon his father's death, and they were put in settlement and conveyed to that amount; or as if it had been given out of any of the Norfolk estates, when they should be vested in him in possession. That this yearly sum came out of her own property * 651 erty * made no difference whatever in the legal effect and substance of the provision; because whether he gave it out of his own estates, or reserved it out of her estates, he equally infringed upon his own right. The *jus mariti* would have vested the whole rents and profits of her estates, just as much as of his own estates, in himself during the coverture.

There is a reference in the latter part of the deed of settlement to the same sum of 700*l.* a year, as follows: That when he should succeed to the estates in which he was severally heir apparent and heir presumptive, namely, the Greystoke estates as heir apparent, and the Norfolk estate as heir presumptive, — that 300*l.* a year should be added to the 700*l.* a

year already set apart for the wife in respect of pin-money, in augmentation of the pin-money thereinbefore set apart and provided for her. There is then another provision made contingent on the succession devolving upon him of these magnificent estates; 2000*l.* a year was to be added to her then jointure: the consequence of all which was that, on surviving her husband, she was to enjoy the whole rents and profits of her own estates, supposing there was no issue of the marriage, and 2000*l.* a year besides if he succeeded to his expected property.

Such was the state of matters when the marriage was solemnized: from a very early period, unhappily, the mind of the duchess proved to be unsound, though no commission of lunacy was then taken out against her; she remained cohabiting with her husband, that is, living in the same house and even occupying the same chamber with him till the year 1809. For the next six years of the duke's life there was more of separation; but this * is, at any rate, cer- * 652 tain, that during the period from December, 1782, to December, 1815, when his Grace died, by the inquisition under the commission of lunacy sued out after the duke's death, she was found to have been of unsound mind, without a lucid interval. She survived her husband five years. In 1820 a bill was filed upon the suggestion of Lord ELDON, then sitting in matters of lunacy: that bill was dismissed on her death: this bill, filed after her death, led to the decree which is now brought under the review of your Lordships by the present appeal.

The duchess (an important fact which is not denied) continued to enjoy good bodily health; she lived not much in society, but was not confined; she went about visiting, and was visited to a certain extent, and the duke, it is not denied (but if so, that will be the subject of inquiry), paid for her maintenance; and when living separate for several years as she did, and having a separate establishment, he paid her milliner's bills, carriages, and, in fact, all those personal expenses with which, more or less, pin-money has connection. The committee having done nothing in this matter during her Grace's life, on her death her personal representative

preferred a claim against the personal representative of the duke, to this effect: the duchess had a right to so much a year for pin-money; if she had been a person of sound mind the demand could not have gone back beyond a year, because beyond a year, or a year and a fraction, the Court never has allowed a claim for pin-money to go back. But this is said to be upon the presumption, that the wife by acquiescence releases the claim; and as that presumption can have

* 653 no place in the case of a lunatic, the Court, * it is contended, is not confined to the year, or the year and a fraction, in this case as it would be in any other, but must go back the whole time; and accordingly 38,000*l.*, or thereabouts, is the sum which is substantially awarded by this decree, to be paid by the personal representative of the duke to the personal representative of the duchess, in respect of an unsatisfied and unreleased claim of pin-money.

First, I must observe, that there is no case in which it has ever been held, as far as I know, that the personal representatives of the wife can go back for a year, or even any part of a year, for the arrears of pin-money. That the wife herself can go back is admitted; but then they say, on the part of the respondent, if the wife can go back for a year, it follows as a matter of course that her representative can go back; because how can one have a claim which does not survive to the representative? I see a very material difference between the wife herself and her personal representative, in respect to pin-money. There may be no difference in the case of an ordinary debt, where

A claim for pin-money is different from all other debts.

there is no peculiar relation between the debtor and the creditor, which peculiar relation it is that distinguishes pin-money from all other cases. What signifies it to the debtor whether he pays the creditor himself, or his personal representative? What signifies it to me, if I owe 1000*l.* of annuity to A. B., whether I pay it to A. B. himself, or, if A. B. dies, I pay it to C. his representative? I am bound to pay him, and his executors, administrators, and assigns; and though at law my debt is not assignable, yet in equity it is assignable, and I am bound to pay the representative just as much

* 654 as I was bound to * pay the original creditor. But is

that the same entirely and in all respects with pin-money? Very much the reverse.

This leads me to consider what pin-money is: for what purpose and with what view it is set apart and provided. In what right the wife enjoys it, and by what obligation the husband pays it. It is not an ordinary debt; it is not a gift from the husband to the wife, out and out; it ^{Pin-money is not like separate estate of the wife.} is not to be considered like money set apart for the sole and separate use of the wife, during the coverture, excluding the *jus mariti*; but it is a sum set apart for a specific purpose, due to the wife in virtue of a particular arrangement, payable by the husband by force of that arrangement and for that specific purpose. I am subject to be corrected upon this as upon all other subjects, and to be better informed, but I have not in this case received any such correction; I have not had the benefit of any light better than I possess myself; I have heard nothing whatever to shake my opinion that pin-money is, with respect to the personal expense of the wife, for the dress and the pocket-money of the wife; its very name implies a ^{What pin-money is.} connection with the person; it means that which goes to deck the person of the wife, and as I should say, upon a somewhat larger construction, to pay her ordinary expenses. A person in a humble station of life, pays his wife's bills as he pays his own; a person in a station a little higher, is accustomed to make, for common convenience, an allowance to his wife of so much for house-keeping expenses, and so much over for her own dress and the dress of her children; a person in a higher station still, makes a general arrangement, which probably extends over years, if not over the whole *coverture; and a person in a higher station, * 655 — in the highest, — makes the arrangement of pin-money by the marriage settlement; which is as much as to say, "you, the wife, shall not be reduced to the somewhat humiliating necessity of disclosing to me every want of a pound to keep in your pocket; or of taking my pleasure and obtaining my consent every time you want to go to the milliner's shop to order your dress; but you shall have so much, consistent with my estate and my income, which you shall

retain apart from me and exempt from my control." It is a refinement which the law has introduced, peculiar to the bargain or arrangement previous to and upon the marriage. The husband exempting it from his control, may be supposed to say, "there shall be your dress-money, your pocket-money, your fund for separate personal expenses set apart for you during the coverture."

That I take to be clearly the nature of pin-money; and if it be so, it is equally clear that no nobleman or person of however high and honourable degree, being in ever so wealthy circumstances, would ever dream of making an allowance to his wife for pin-money, if he were at the same time to be paying all her bills year after year, her milliner's bills and others, over and above her pin-money. If it is the right construction of law upon pin-money, that the husband is to pay the bills, although he has provided the other fund, the sooner it is known to all persons about to enter the state of matrimony the better. But that being clearly, according to my view of the case, not the intendment of the law upon the subject, and pin-money being such as I have described it, I

take this to follow: that there is a difference between * 656 this provision and a debt to * strangers; a difference arising from a separate fund being set apart as pin-money, and from the mode in which it is to be expended, the kind of expense which it is intended to defray; an expenditure in which the husband as well as the wife may be said to have an interest, for the wife is to dress according to his rank, not her own. Here the lady became the wife of Mr. Howard of Greystoke immediately, but she became in expectancy a duchess; because her husband, as it was known at that time, stood in the line of succession and made provision for the event of his succession to Edward then Duke of Norfolk. He was to pay to his wife, as duchess, so much more jointure, and so much more pin-money. On Duke Edward's decease she was to become the very first lady in the land, as a subject; next to the royal family; she was to be provided for according to the magnificence of that high station of premier duchess of England, occupying the highest station which any female subject of the King, out of his own royal family,

could possess; she was to be adorned according to her degree, not as Miss Frances Fitzroy Scudamore, or Mrs. Howard, but as the wife of Charles Duke of Norfolk, and hereditary Earl Marshal of England. She was to maintain that station which she derived from being his consort; a station next to royalty in the society of this country. It was, therefore, the duke's interest that this money should be retained for supporting his wife's rank, and this ample provision was made plainly with a view to supporting the station of his wife; the duke her husband had the fund in a certain degree in his own power, and it is in contemplation of that power that the law says "you shall not go back beyond a year." If his wife * chose to dress herself like a mechanic's housewife, or * 657 a farmer's dame, or as a mere servant, instead of the first duchess of the land, and to pay 25*l.* of her 1000*l.* a year for dress, instead of appearing in the attire becoming her condition: if instead of paying for dress, of which the Duke of Norfolk would have no reason to be ashamed when he took her to court, she dressed like a tradesman's wife, and filed a bill in Chancery for the savings of the annuities, the Court of Chancery would not have given her an account of the fund.

It is an error to suppose that the ground on which that Court would refuse to go back a year, is only because of the supposed satisfaction by acquiescence; that is not the sole reason. The Court refuses to go back for this obvious reason; that the money is meant to dress the wife so as to keep up the dignity of the husband, not for the mere accumulation of the fund; and as it is meant that the money should be expended for the husband's honour, to support his and her rank in society, if the *femme* did not choose to pay away the money to the baron's honour, she would in vain come to the Court of Chancery and pray, "order payment of 9000*l.* into my banker's for 10 years; for I only spent 1000*l.*, when it was meant that I should spend 10,000*l.*" The Court of Chancery would say, "your Grace comes here in vain; you might have asked it year by year, and we, if you had asked it, should have given it to you." Now that is good practice, it is sound reason and plain

Presumed satisfaction by acquiescence is not the only reason of the rule by which the Court of Chancery refuses a wife's claim for arrears of pin-money for more than a year.

common sense ; it provides a check and control to the husband ; it secures the appropriation of the money to its natural and original purpose ; and it is for that view, quite as much as on account of the presumed satisfaction by

* 658 acquiescence, that the * Court of Chancery on principle, and by a settled rule on the subject, will not allow a

wife to claim pin-money beyond a year. This illustrates the reason urged by the appellant's counsel, and the distinction

Reasons of the distinction between the right of the wife herself, and of her representatives, to arrears of her pin-money.

they justly took in the course of this argument, between the representative taking the money, and the wife herself taking it. It is one thing to say that, during the wife's lifetime, a year's arrear shall go to the wife ; and a totally different thing to say, that the Duke of Norfolk shall pay the wife's personal representative 1000*l.* The Court of Chancery sees that the Duke of Norfolk may have some interest and advantage in having paid the wife 1000*l.* of arrear, because it pays the milliner's bills, which, but for that, he is liable to pay ; if she has run up 1000*l.* of debt with her milliner for dress, or with her jeweller for the wear and tear of jewelry and other ornaments ; if she has incurred a bill which is consistent with the degree and station of the duke, he might be compelled by an action at law to pay it ; but if the pin-money is paid to the representative of the wife, the duke is still liable to the action, and that forms a most material distinction between this and the case of a common debt. If I have a debt against the Duke of Norfolk, it is quite immaterial to him whether he pays it to me, or to my representatives after my death ; because if he pays it to my representatives, he is not liable to pay it over again ; but very different is this debt of pin-money : for if he pays it to his duchess's representative the year after her death, he is liable to pay the duchess's milliners, if they bring an action against him for her dress, even after he has paid it to the duchess's personal representative. This

is a convincing proof of the total difference between
* 659 the two * cases ; it illustrates strongly that which is the foundation of my opinion, the difference between pin-money and other claims ; but it also answers, and I think irresistibly answers, the argument urged with some plausibility

for the respondents, that if the money due to the duchess were a year's arrear, or a year and a fraction of a year's arrear, as one of the cases gives it, therefore the same must be equally due to the duchess's representatives. No case can be produced which shows that a single farthing has been given by the Court of Chancery, even for a month's arrear of pin-money, to the wife's representatives; to the wife herself it has been given, but never to her representatives.

No authority for the claim of the wife's representatives to any arrears of her pin-money.

I have dwelt so long upon this part of the case, not merely to illustrate the distinction I take between pin-money and other separate estate of the wife, but for another reason also, because it carries your Lordships a good way in the argument upon that part of the case which I am now about to dispose of, and materially aids the appellant's argument, where he denies altogether his liability even for one year's arrear of this pin-money; denies that the personal representative of the duchess has a right to claim any arrears.

I proceed now, my Lords, to apply the argument to the first part of the case, with which alone I am now dealing. It is surely a very imperfect view which is taken of the foundation of the cases in Chancery, allowing a year's arrear to be claimed by the wife during her life, to say that this is owing to a presumption of satisfaction of the income of former years; I think that that is not the only foundation; I have suggested another from the nature of pin-money; but I will state to your Lordships a ground * which * 660 seems in the present case decisive against the judgment of his Honor; there is a presumption of actual satisfaction of the party's demand in this way; The wife having the pin-money allowed her for the purpose of her apparel and pocket-money, the Court says, "we will not suppose you to be above a year without the means of dressing yourself according to your rank, or paying your tradesmen's bills; but we will suppose that the year before, and in all preceding years, they were paid by the husband; and we know that if he has not paid them, he is liable to pay them, being for necessaries according to his state and degree." Can any person who considers the subject, doubt that precisely the same presump-

tion is applicable to the case of this noble lady, as to the case of any wife who might have been of sane mind all her life? It is true the duchess was of non-sane mind and memory; it is true that the inquisition declares this affliction to have begun in 1782. But is a lunatic incapable of receiving the benefits of the expenditure of money? May not money be expended for her? Might not the duke pay her milliner's bills? Might not he pay for the ornaments of the person decked in them, to his credit and her own? Might not all this

happen year after year, just as much if she were lunatic as if she were of sound mind? The argument for the respondent is this: you cannot presume satisfaction, because she cannot release a debt, being a lunatic; you cannot presume silence to be acquiescence, or an abandonment or waiver of her claim; because silence in a lunatic would not make that claim amount absolutely to any thing. I agree that generally speaking it does not; but there is another principle, there is another presumption to be taken into the ac-

* 661 count, * which is applicable to the case, and that is the ground upon which the Court acts in giving nothing beyond the year, or at most the year and fraction; the presumption is this, that the money has been paid, if not directly to the wife in money, yet received to her use in bills paid by the husband, in discharge of debts incurred for necessities, or ornaments for the use of the wife's person. Will any man contend that such a principle of decision does not apply to the case of a lunatic? Can it be doubted that a lunatic may receive payment by the discharge of her milliner's bills, and that thereby her demand for pin-money may be satisfied?

Pin-money is, in its nature, for the use and purpose of paying these bills; the only difference is, that the Duke of Norfolk, instead of paying over to his duchess money wherewith she might pay her milliner, paid her milliner, and saved her the trouble of transmitting the sum. The law on this point, at least, is as clear, both in equity and in lunacy and at common law, as that a man's eldest legitimate son is his

heir to freehold land. A lunatic cannot bind himself by bond or by bill; a lunatic cannot release a debt by specialty; cannot be a cognizor in a statute merchant, staple, a judgment, warrant of attorney, or any other security, I admit; but that a lunatic cannot receive payment of a debt, cannot receive money's worth, and thereby make himself, his executors, and administrators, that is, his assets, liable in discharge for what he has received, I hear to-day for the first time. I do not say that I hear it broadly stated, because the learned counsel are too good lawyers to state such a proposition directly; but I hear it assumed; I hear arguments built on the assumption, arguments which but for that assumption *crumble *662 into pieces the moment you touch them. It is the foundation of the whole of those arguments. I constantly pressed the learned counsel to say what possibility there was of distinguishing the case of the duchess being a lunatic, from that of any other wife not being a lunatic, in respect of the presumption of payment of milliner's bills, and upon the position that the duke, her husband, was not bound to pay twice over the money provided for the payment of these bills; and I think I received not only no satisfactory answer, but no answer at all; I generally received an argument upon another part of the case in answer to those inquiries.

In the case of the Earl of Portsmouth, (a) a heavy bill was made the subject of an action, by a coachmaker, against his committee, for whom I was of counsel. The earl was an undoubted lunatic, found so on inquisition after much litigation; the jury had carried back their finding beyond the period of the coachmaker's bill; consequently the production of that inquisition was *prima facie* evidence of the lunacy. The jury, on the trial of the action, found for the plaintiff, under the direction of the Lord Chief Justice; and the Court afterwards refused to disturb the verdict, holding that the committee were bound to pay, notwithstanding the finding upon

(a) *Baxter v. Earl of Portsmouth*, 5 B. & C. 170.

¹ See *Chitty Contr.* (10th Am. ed.) 151 *et seq.*; (9th Eng. ed.) 135 *et seq.*

the inquisition. A case occurred a year after at York, to the same effect: there we set up a defence of lunacy, and Mr. Justice BAYLEY would hardly allow the objection to be raised. He said, "you cannot stultify yourselves in this way. Is a man of doubtful sanity to go about dealing with honest tradesmen, and to say afterwards that he will set up
 * 663 his lunacy to *avoid paying the bills? There is nothing extravagant in this bill; there was nothing to give the party notice that he was dealing with a madman; he got the goods delivered to him." A verdict was recovered, and the defendants never sought to set it aside. The practice is the same in Chancery on matters of lunacy. Nothing is more common than for the Chancellor to confirm a Master's report, making allowances to A. B. for moneys paid for the use of the lunatic, — to C. D. for having maintained the lunatic; to E. F. for having clothed the lunatic. Upon what ground are all these allowances made? Not from kindness, not from charity, not for the convenience of the parties; but because they are debts; because in the eye of that Court, be it a Court of Law, or a Court of Equity, or the Chancellor sitting in lunacy, they are valid debts incurred by the insane person, and are discharged by the justice of the Court. It is certainly done not for the interest of the lunatic, because that would be better consulted by rejecting the claim, and by saying, "why did you throw away your money or your care on an insane person, who had not the power of paying you, or binding himself to pay you, and who could give no acknowledgment for it?"

Now these cases can, upon no conceivable principle, be distinguished from the one I am now considering; for they all show that a lunatic — whose silence would be no consent, whose acquiescence would not be a waiver, whose obligation by a bond would not bind him, whose conusance of a judgment would not bind him to the conusee — may nevertheless, by receiving the property of another, and using it for his own benefit, or, as in this case, by receiving clothes, or the
 * 664 value in payment for *millinery or repairs of articles of dress, so far bind himself to the person who pays for the goods, as to enable the latter to set off the money so

paid for the lunatic, against a claim in our Courts *in pari materia*; that is, against the claim of money which was provided as the alternative of his not paying for the goods. The duke pays for the dress, instead of paying the 1000*l.* a year; and the party's being a lunatic is no more a reason for refusing him the power to set off money so paid to the milliners, than if she were a person of sound mind, where, *ex concessis*, it is quite clear it would be set off. I feel no doubt whatever upon this point, and have no hesitation in pronouncing my opinion, that as regards the judgment of the Vice-Chancellor, it cannot stand; that the case must, at all events, be referred to the Master, with power to the personal representative of his Grace the late Duke of Norfolk, to set off whatever may be proved to have been properly paid by him in respect of the lunatic's dress, &c.

Upon the other question, whether any claim at all by the representative is to be allowed, I profess to have an inclination of opinion favourable to the appellant. I have stated generally the grounds upon which I distinguish pin-money from all other debts; upon these grounds, as at present advised, I incline to reject altogether this claim of pin-money by the personal representative of the duchess, against the duke's representative, as inconsistent with the nature of the thing. But this part of the case is of the first impression. I have heard the arguments urged for the respondent with very great ability by both his learned counsel, who have done all possible justice to their client; and I wish to be assisted on this part of the case by the reply of the learned counsel for the appellant.

* Before concluding these observations, and closing * 665 them with the proposition which I am about to throw out to the parties, I shall add another observation, which may, as it strikes me, further illustrate the distinction between pin-money and other property of the wife. I have shown the distinction between a claim of pin-money and debts claimed by a stranger creditor against a stranger debtor. But observe also the material difference between this case of pin-money, in all its incidents, as well as in its nature; observe the different way in which the Court deals with it, and with

money settled to the separate use of the wife. I was surprised to hear it said that these cases of separate estate are subject to the same rule as if they were pin-money, and that the claim of the wife in them also is confined to a year. Can anybody seriously maintain that as a proposition of law? Suppose I settle upon a wife, with no reference to pin-money, 1000*l.* a-year to her sole and separate use, her receipts only to be a discharge and not mine, under her power alone to be recoverable, and exempted entirely from my control; and suppose that I vest a fund in trustees for that purpose; can any one doubt that the wife, who had not received that annuity for six years, would have a right to recover that arrear? Can it be contended that the wife's claim would be confined to a single year? Clearly, the trustees would be bound to see that the whole amount was paid her. That is the difference between the provision of separate estate and pin-money, which is confined to a year, or a year and a fraction.

I have spoken with distrust of my opinion upon one part of the case, and stated it as only the leaning of my opinion.

* 666 But I expect to have more *light furnished by the argument in reply. If I eventually entertain any doubt, I shall consult the noble and learned Lord who presided so long in the Court of Chancery. I have taken a full note of the arguments, and of the cases which have been cited, and I shall be able to refer him to the particulars. I close these observations with a suggestion to the learned counsel for the appellant, to consider whether they will be satisfied to take an immediate reversal, with a remit to the Court below, to send the case to the Master, with instructions to take an account of the payments made by the duke, and to set them off against the claim; or whether they will argue the case on the larger footing, which I have before stated. If they are satisfied with the first proposition, there will be an end of the discussion.

Sir Charles Wetherell. — I opened a case of total discharge, and I shall contend for that.

THE LORD CHANCELLOR. — I am not surprised that you do ; we shall hear your reply on a future day.

June 24, 30.

Sir Charles Wetherell replied. — The exact and lucid statement of the facts of this case, and of the law as applicable to them, by one of their Lordships on a former day, relieved him from the necessity of any further argument on one part of the case ; for no one could after that statement, if he could before, doubt that this decree was erroneous in not directing a reference to the Master to take an account of the duke's payments in respect of the duchess's dress and ornaments, and to make such inquiries as might enable the duke's representative to establish more completely the grounds on which he resisted the claim to arrears. He would still insist, * even with more confidence than in his opening * 667 address to their Lordships, upon the other parts of the appellant's defence to the claim of the respondent ; first, that the claim for arrears of pin-money was never carried by a Court of Equity further back than one year, or a year and a fraction, and that the claim so restricted was subject to a set-off and deduction of such sums as might be found, on an account taken, to have been paid by the husband in respect of the provision of pin-money. He cited in support of that proposition, the cases before referred to, and, *Parkes v. White*, (a) and said, that any exception from the general rule established by these cases was founded on special circumstances. But in no case did it appear, that after the wife's death, her personal representative or next of kin brought such a claim as this against the husband or his representative. With all the industry exerted on behalf of the respondent, no such case could be produced ; law, and reason, and common sense were opposed to such claim. [The learned counsel repeated and adopted the Lord Chancellor's arguments and conclusion on that point.]

The second and the only remaining question for consideration was, whether the special circumstances of the case did not afford peculiar grounds for maintaining that any claim to

(a) 11 Ves. 203.

arrears must be considered as extinguished? These circumstances, instead of affording an exception to the rule of limitation to a year, should, on the contrary, be held to extinguish the claim altogether. The arguments for the respondent went to this extent, that the duke having expended a sum equal to or even exceeding the pin-money in providing the

* 668 duchess with clothes, &c., * was still liable to pay every penny of the fund provided for that purpose. Would not that be paying the same thing twice; first paying for the articles supplied, and after they were supplied and paid for, then paying over the fund out of which they were provided? Was that consistent with equity or justice? Was it meant to be argued that the duchess was entitled to the dress and paraphernalia, *ultra* the pin-money? The answer of the respondent to these monstrous propositions was this,—the incapacity of the duchess, by reason of her lunacy, to assent to the due application of the fund; and therefore her next of kin were to have the benefit, and, from her unhappy situation, to derive title to the accumulations of the fund. Was it intended to be maintained in argument, that a principle was to be applied respecting a demand in which a *feme covert* of unsound mind was concerned, different from that which was applied to a *feme covert* sane? The consequence of establishing such a distinction would be, that a husband of an insane woman, who could not give a receipt or release, could never during the coverture, if the insanity of the wife lasted so long, get himself discharged from the arrears of pin-money, although he scrupulously applied the whole of it to the purposes for which it was intended by the settlement; which would be a preposterous and mischievous rule.

[THE LORD CHANCELLOR.—The decree of the Vice-Chancellor went on the assumption that not one farthing of the pin-money had been paid; and that the Master, under the order directing him to compute the arrears, had nothing to do but to multiply 1,000*l.* by thirty-three years, the product of which process the appellant was to pay.]

Had the duke survived the duchess, the whole of the
[546]

arrears, if * any could be, would have come to him : so * 669 that, according to the argument for the respondent, the wife's pin-money might, without the application of a farthing of it for her use, be thus made an accumulating fund for the husband, than which no proposition could be more absurd. He cited on this part of the case, *Justice Dormer's Case*, (a) *Thomas v. Bennett*, (b) *Fowler v. Fowler*. (c) The appellant was not bound by the finding on the inquisition of lunacy. There was no admission in the pleadings that the duchess was without lucid intervals. If there had been one hour of lucid interval in the mind of the duchess ; if in any five minutes of a lucid interval during the thirty-three years the duchess were proved to have said or written to the duke, " What are all these directions about pin-money for ? I am grateful for your payments and kind treatment of me ; for having been established in my splendid mansion by you, and kept in all the comfort and magnificence to which I am entitled ; " if a letter containing such sentiments were produced, the whole argument for thirty-three years' arrears would have crumbled to atoms.

THE LORD CHANCELLOR.—This is a case of great importance, and consequently it was my duty to see that it should receive the most ample discussion ; more especially as I felt that it was quite impossible for me, upon the best consideration I could give the case, to arrive at the same conclusion in all respects as that to which the Court below had come, and inasmuch also as this is a case in many respects novel, there being little of authority upon it in the books. It is wonderful, indeed, how little there is to be * found upon the subject * 670 of pin-money, notwithstanding its occurring almost every time that a marriage takes place among persons of large fortune. You cannot get from the books even a definition upon which you can rely ; you cannot trace the line which divides it from the separate property of the wife with any distinctness ; and as to authority, either of decisions or *dicta* of text writers, or of judges, there is nothing that furnishes a clear and steady

(a) 2 P. Wms. 265.

(b) 2 P. Wms. 341.

(c) 3 P. Wms. 353.

light on the subject; the cases running from pin-money into separate estate, and from separate estate into pin-money, in such a way that where a text writer quotes a case — *Brodie v. Barry* (a), for instance — in support of a doctrine touching pin-money, you look at the book and find it has nothing to do with pin-money, and does not support the proposition for which it is cited.

I remain of opinion that this decree cannot stand. The Duchess of Norfolk having been thirty-three years insane, and the duke having for the whole of that long period of time not only paid the expenses of her establishment with a munificence and liberality adequate to her station, but having also, beyond a doubt, paid all the personal expenses of her Grace, for pocket-money, for trinkets, for millinery, in short, for every thing on account of which pin-money is generally supposed to be provided, — her executors after her death claim 33,000*l.* as arrears of pin-money, she having survived the duke five years, during which she had the ample jointure of 2,000*l.* a year out of the duke's estate, besides her own private fortune of 11,000*l.* or 12,000*l.* a year; all, in consequence of the lunacy, accumulating. Her repre-

* 671 sentatives proceeded in the exercise of a duty * which they could not perhaps avoid, as it was considered a question fit to be raised by Lord ELDON, who suggested that the opinion of the Court should be taken upon it. To this demand the executors of the duke answer: "You cannot both have the pin-money and also the payments made by the duke out of his own pocket, for the very things to provide which pin-money was given." I also take leave to add, that this distinction on the subject of pin-money must be taken: There is no case in the books in which pin-money has been given, not even for one year, in any case to the representatives of the wife; for this obvious reason, arising from the nature of pin-money, because it was meant not for the sustentation of the wife, but for her dress and ornament in a station suitable to the degree of her husband; so that the Court gives the arrear to the wife of a year or a year and a fraction;

(a) 2 Ves. & Bea. 36; and 2 Roper, Law of Husband & Wife, 133.

because if it be not given to the wife, the husband is liable to pay her debt for necessaries according to her degree, and he advances the money to her in order that he may exonerate himself from payment for those necessaries. But if the wife dies, and her personal representatives make the claim (and this does not appear to have been considered in the Court below), the fact of the husband or his representative paying the arrear to the wife's personal representatives does not in the least exonerate the husband or his estate, because he or his representative is just as liable to pay the undischarged debt for necessaries, according to the husband's rank, as if he had not paid the amount to the personal representatives of the wife. I have, therefore, no doubt whatever that you cannot allow the 33,000*l.* without an account. The decree below says they are to have the whole 33,000*l.* without any account; so that even if the *duke had paid *672 2000*l.* a year for expenditure of the wife in the nature of pin-money expenses, not one farthing of that can be deducted. At all events, therefore, there must be an account in the Master's office, and credit allowed for pin-money expenses, in so far as the duke's representatives shall be able to prove to the satisfaction of the Master that he had paid those pin-money expenses.

There remain two other questions which I must crave time to consider further, because on those two my opinion is not so clear, especially on the third; whether there can be in this case any claim at all for pin-money? Whether there should be allowed a year, or a year and a fraction to the executors, in respect to which year, or year and a fraction, the cases have allowed it to the wife herself? That is a point which, as there is no case or other authority either way, I wish to have time for considering. With this view I shall move your Lordships that the further consideration of the case be postponed, wishing only to state here again, that if the decision of the Court below be allowed to stand, and the doctrine be recognized that the wife may accumulate her pin-money while the husband pays her bills, and may then leave the accumulation to others, the sooner that doctrine is known the better; for I am quite sure that, instead of 1200*l.* or 1500*l.* a year,

or 1000*l.* a year, which last was the allowance in this great family settlement, a much smaller and a conditional allowance only will in most instances be made for the future.

July 11.

The Lord Chancellor, in moving final judgment, briefly recapitulated the facts which led to the suit, and the proceedings in it up to the decree of the Vice-Chancellor. His Lordship then proceeded :

* 673 His * Honor's decision was, that an account should be taken by the Master in the cause, of the arrears due for pin-money, from the year 1782 till the time of the death of his Grace (December, 1815); and no further direction was given of any other account to be taken, or any credit to be given to the duke's estate for any moneys that might have been paid in respect of those expenses, to provide for which the pin-money was settled. Very early in the argument of this case, I entertained an opinion that this decree could not stand; and that it was clearly erroneous to hold, that whatever had been paid by the duke was immaterial; that no payment by him was to be carried to the account; that if the very money itself had been received by her Grace during that time, it should not be taken into the account: to hold that no account should be taken of the pin-money expenses defrayed by the duke during those thirty-three years, appeared manifestly erroneous; for the decree was merely a reference to the Master to multiply 1,000*l.* by 33, and to give the whole to the duchess's representatives.

This opinion was confirmed in the course of the arguments, which left me with a very decided impression, which I stated for the convenience of the parties, in the hearing of the counsel on both sides; and I then made a proposition to the learned counsel for the appellant, that if they would be satisfied with a declaration, and with remitting the cause to the Court below with that declaration, so as to take an account in the Master's office of the payments made for pin-money expenses, then, without calling on them to reply to the elaborate and ingenious arguments on the other side, I should

have no hesitation in moving your Lordships to make such an order. As, however, I had plainly indicated the leaning of my opinion * upon the rest of the case also, I * 674 was not surprised at the learned counsel preferring the other alternative, and going on with the reply. I then again went into the subject, and I was glad to have an opportunity of doing it in the presence of an unusually great number of your Lordships, greater than I almost ever saw at any judicial proceeding, from the accident of the case having been protracted to the hour of the day at which your Lordships usually sit for the ordinary business of the House. I have since held communication with a number of those noble persons, whose opinions are entitled to great weight, and I find that my impression respecting the nature of pin-money is by no means confined to myself; that the view I had formed of it is the universally prevalent view among all who have considered the matter.

Upon a subject of this sort, where authority is so scanty, that you hardly can find any *dictum* in the books as to the purposes to which pin-money is devoted, I am far from thinking little of the general sense of your Lordships, who are the persons of all others most conversant with the nature and object of pin-money, and whose settlements are made with reference, in some degree at least, to its amount. It is a very material fact, in a case where authority is so little to be had, that the general opinion of all those who give pin-money, either to their own wives or to the wives of their sons upon marriage, should be entirely coincident with the view to which the argument led, namely, that it is a sum allowed to save the trouble of a constant recurrence by the wife to the husband upon every occasion of a milliner's bill, upon every occasion of a jeweller's account coming in. I mean not the jeweller's account for the jewels, because that is a very different question; but I mean for * the repair, * 675 and the wear and tear of trinkets, and for pocket-money, and things of that sort. I do not, of course, mean the carriage, and the house, and the gardens, but the ordinary personal expenses. It is in order to avoid the necessity of a perpetual recurrence by the wife to the husband, that a sum

of money is settled at the marriage, which is to be set apart for the use of the wife, for the purpose of bearing those personal expenses. I stated the consequences of this doctrine, and that they appeared to exclude the claim, and left little or no doubt upon the question, save upon one part of it; and that is, how far personal representatives were entitled to go back a year, or a year and a fraction. I stated the reasons why I considered, in the first place, that the nature of pin-money excluded the claim, by whomsoever made, for the by-gone thirty-three years; and that in the next place, the nature of pin-money seemed also to exclude a claim by personal representatives, even for the smallest portion of the period. I stated the reason why the proposition of exclusion, both as to the large and as to the lesser extent, seemed to follow from the nature of pin-money. I took further time to consider this part of the case, and the result has been to confirm my opinion upon both the points, and I will now shortly state the grounds: First, with respect to the whole period; shall it be said that the money allotted to the wife, is so allotted to her that she may consider it as a sum given every year, to do with it as she pleases? That her Grace of Norfolk, the first lady in England after the blood royal — who takes precedence of all the king's female subjects while her husband is preceded by several from official rank, — shall it be said that this lady may dress herself like a peasant's wife; may

* 676 lay out 10*l.* by the year upon * her own personal expenses; may give no moneys either in charities to the poor, or in *largesse* to her servants, her attendants, or her maidens? In former times, when pin-money was first introduced, the Duchess of Norfolk had ladies in waiting, esquires' wives and barons' daughters, just as the Queen of England has at this day. The less aristocratic habits of modern times have altered that, but pin-money was invented in the days when the Duchess of Norfolk was more like a princess than a subject; shall it be said then that this distinguished lady is to give no *largesse* to any of her attendants or servants; that she may dress herself either so that she shall not be admitted at Court, or so that she shall never appear at a county meeting, or an assize ball, or upon any of those occasions where

the nobility of the country show themselves among their fellow-subjects; that she may dress herself in such a manner that she shall not be able to show her face at those places of resort, or so that if she appears, her noble consort shall be ashamed of seeing her there, and of owning his connection with her; that she may in every respect spare every expense upon her person, and hoard her pin-money; that she has a right to do so in neglect of the rank, and in spite of the authority of her husband; and when her husband dies that she may claim, or when she dies that her representatives may claim, the whole arrears of this pin-money, as if it had been set apart as an annuity of which she had a right to the sole and separate use, and to the arrears of which she had just as good a right as her husband had to the residue of the estate upon which that annuity stands charged? Is that a tenable proposition? The principle of this decree cannot stop short of that proposition; they who maintain it, must either maintain that proposition, * or they are out of court * 677 and can maintain nothing. I deny that such is the nature of this provision; it is meant for the wife's expenditure on her person, it is to meet her personal expenses, and to deck her person suitably to her husband's dignity, that is, suitably to the rank and station of his wife. It is a fund which she may be made to spend during the coverture by the intercession and advice, and at the instance of her husband. I will not go so far as to say, because it is not necessary for the purpose of this argument, that he might hold back her pin-money if she did not attire herself in a becoming way. I should not be afraid, however, of stretching the proposition to that extent, but I am not bound here to do so, because if during her coverture a claim was made by her (and this is one distinction between the claim of the wife, and the claim of her personal representatives after her death), the absurd and incredible state of things that I have put as the consequence, the case of her attiring herself in an unbecoming manner, never could happen if the pin-money is only to be claimed by herself; for in that case the duke would of course say, "If you do not dress as you ought to do, what occasion have you for pin-money?" He need not refuse, but he remonstrates; he

uses that influence which the law supposes him legitimately to have over his wife, and sees that the fund is duly expended for its proper purposes. The purpose is not the purpose of the wife alone ; it is for the establishment, it is for the joint concern, it is for the maintenance of the common dignity ; it is for the support of that family whose brightest ornament very probably is the wife ; whose support and strength is the husband, but whose ornament is the wife. It is to support the

dignity and splendour of the joint establishment consisting of husband * and wife, that part of the whole expenditure is for the support of the wife herself.

Then does it not follow from thence that the husband has a direct interest in the expenditure of the pin-money ? He has a right to have the pleasure of it, to have the credit of it, to be spared the eyesore of a wife appearing as misbecomes her station : that is the distinction and the object of pin-money.

Having stated the principle, I have now to show its application to the two branches of this case ; the one relating to the thirty-three years, and the other to the year, or the year and a fraction. I say it follows from the principle, as to the first branch, that if during the longer period the expenses of her person, and the demands upon her pocket for those things to which pin-money is applicable, have been defrayed by her husband ; if he has not only kept, during her unfortunate illness, a separate establishment for her, providing for those expenses for her, from which pin-money stands apart (as house and garden, servants, carriage, and horses), but has also during all that time paid all the milliners' bills, all the wear and tear of trinkets, all the little expenses of pocket-money ; then I say, that even if she were alive and came for an account, she could not have it both in the one way and in the other ; she could not have it both in kind and in money ; she could not have the bills paid for her, and the money paid to her which was originally settled upon her for the sole purpose of paying those bills. That I hold to be a perfectly clear proposition ; yet no account whatever has been directed on that principle, in the decree referring it to the Master to take an account ; and it is not denied that those expenses

were paid by the duke during the coverture. In the next place there is this material * observation, which * 679 applies to both branches of the case, and in my view disposes of the whole. If she comes forward and makes the claim during coverture, of course the husband takes care that the bills are paid, and he has an opportunity of controlling her, so that she shall not go and game, for example, with her pin-money, and leave him to pay her milliners' bills. But if the same claim, whether it be for thirty-three years or for twelve months, may be made by her personal representatives after her death, either upon the husband if he is living, or upon his representatives if he has predeceased her, then what follows? he is bound to pay the pin-money, and he is liable to the bills too; because the husband is liable to pay the bills of dressmakers and other such persons, provided the articles furnished are of a kind suited to his and his wife's station in life. That is the meaning which the law affixes to the term necessities; and nothing will relieve him from the claim of necessities except a proof (and that only when the husband is living apart from the wife) that they are separated, that he has made an allowance adequate to her support, and, as the late cases in the Court of King's Bench have determined, that he has actually paid the sum allowed for her separate maintenance. Nothing short of this defeats the claim for necessary expenses. Therefore the duke's representatives would be liable to pay the bills for which that pin-money was allotted. Can it be contended that such is the law, that such is consistent with the nature of this provision? It might as well be said, that pin-money means an annuity set apart, a separate sum set apart for the wife during the coverture, which she may use as she pleases, and come upon her husband for her personal expenses besides: such a proposition cannot be maintained in any consistency * with * 680 principle, or deduced from any authority that can be referred to on the subject.

Upon these grounds, I have no doubt that the judgment appealed from is wrong; I have stated several others upon former occasions; and upon both those propositions, every thing which I before said has appeared to me, upon further

consideration, to be well founded. I have no hesitation, therefore, in recommending to your Lordships to reverse the decree of the court below, after making one further observation: it is this, — that there is not only no one instance shown, but nothing like an instance, of pin-money having been allowed except to the wife. It is one thing to allow it to the wife, it is another thing to allow it to the wife's representatives; and should we affirm this decree, we should not only go the length of laying it down that pin-money is an unconditional provision, and that all that the husband may have paid for the wife cannot be set off against the claim, whether the claim he made during the wife's lifetime, or after her decease by her representatives; but we should be affirming another proposition, for the first time; we should be making a precedent, the first that can be shown to exist, of a claim of pin-money to any extent whatever allowed to the wife's personal representatives after the wife's death; and I am not prepared to advise your Lordships to make any such precedent: it would be going further than any case has yet gone; it would be contrary to every principle of the law generally, and to the whole spirit of the law upon this subject.

The question was then put and the decree was reversed.

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* APPEAL

* 681

FROM THE COURT OF EXCHEQUER CHAMBER.

TOULMIN v. COPLAND.

1834.

| | |
|--------------------------------------|---------------------------------|
| MARGARET TOULMIN, THOMAS BUTTERFIELD | } <i>Appellants.</i> |
| SIMPSON, and BRYAN HOLME | |
| JOHN COPLAND | <i>Respondent.</i> ¹ |

Partnership, shares therein.

R. T. and A. T. having carried on business in partnership in equal moieties, the former retired, leaving large sums due to the partnership from its customers, and some debts also owing from the partnership. A. T. entered immediately into partnership in the same business with C., and it was agreed between them, but not in writing, that upon A. T.'s bringing into the new partnership 40,000*l.* of good debts owing from customers of the then late partnership, for the purpose of meeting claims of debts from that partnership, transferred to the accounts of the new partnership, A. T. should be entitled to two-thirds of the new partnership, and C. to one-third. This partnership business was carried on for fourteen years without any settlement of accounts, or any entry in the books declaring the terms of the partnership. It appeared that within the first five or six years, 40,000*l.* were received from the debtors of the former partnership, but not so much, if the advances to them by the new firm were deducted from their payments. *Held*, that 40,000*l.* of good debts were brought in according to the intent and spirit of the agreement.

Moneys paid by debtors, without specifically appropriating them, are to be applied in discharge of their oldest debts.*

May 26, 30.

For several years previous to the year 1806, Richard Toulmin and Abraham Toulmin, both since deceased, carried on the business of navy agents, in *partnership together, * 682 in equal shares. That partnership was dissolved on the 31st of August, 1806, in consequence of the lunacy of

¹ S. C., 7 Cl. & Fin. 349.* See Nottidge v. Prichard, *ante*, 393, note 2, and cases cited.

Richard Toulmin. Abraham Toulmin having then become entitled to carry on the business on his own account, formed a partnership with the respondent; and they carried on the business of navy-agents in partnership, under the style and firm of Toulmin and Copland, from the 1st of September, 1806, to the 4th of January, 1819, when Abraham Toulmin died, having by his will bequeathed all his estate and effects to the appellant Margaret Toulmin, his widow, and appointed her and the other appellants executrix and executors thereof, who duly proved the same, and thereby became his legal personal representatives.

There being no deed or written memorandum of the terms of the partnership between Toulmin and Copland, a dispute arose between the appellants and respondent, respecting each partner's share in the capital and profits of the business; and on the 16th of January, 1819, the appellants filed their bill in the Court of Exchequer against the respondent, making also the governor and company of the Bank of England, in whose books a sum of 16,000*l.* in stock was then standing in the name of and as belonging to the partnership of Toulmin and Copland, defendants thereto. The bill stated (amongst other things) that on or about the 1st of September, 1806, it was agreed by and between A. Toulmin and the respondent, that the respondent should become a copartner with the said A. Toulmin, in carrying on the said business of navy agents, and should bring into the business 8000*l.* That A. Toulmin should be entitled to two-third shares of the profits, and the respondent to the remaining one-third share. That the business had been carried

* 683 * on upon these terms, up to the time of the death of A. Toulmin (except that the respondent did not bring into the concern more than 4000*l.*), and that the said business was very profitable. The bill prayed for the usual accounts of the partnership dealings, and for a receiver of the outstanding debts; and also that the respondent be restrained by injunction from collecting the same, and from transferring the stock standing in the name of the firm in the bank books, and that the governor and company of the bank be restrained by the like injunction from permitting such transfer.

The respondent by his answer stated, that the copartnership was to be carried on upon the terms, that A. Toulmin should bring into the concern good outstanding debts due to the partnership of R. and A. Toulmin, to the amount of 40,000*l*. at least, in order to set them against debts to that amount due from that concern, and by that means to preserve the connections of the old firm to the new firm, without subjecting the latter to liability for the debts of the former. That the respondent should bring into the partnership 4000*l*. in cash. That upon these conditions being fulfilled on both sides, A. Toulmin should be entitled to two-thirds of the profits, and subject to the like proportion of any losses that might be sustained, and that the respondent should be entitled to the remaining one-third of the profits, and subject to one-third of any losses of the partnership; but that at the expiration of five years from the time of such agreement, they, A. Toulmin and the respondent, were to be interested as partners in equal shares; and in case A. Toulmin should fail to bring in good and available debts to the amount of 40,000*l*. from the old partnership, to answer the purposes before mentioned, * the partnership should in that case be carried * 684 on upon equal terms, both being entitled to equal moieties of profits, and liable to the losses in like moieties. The respondent in his said answer, insisted that A. Toulmin failed to bring in the said sum of 40,000*l*. of good debts of the former copartnership, and that the latter alternative of the agreement was adopted and acted upon by him and A. Toulmin, and that they became interested in the partnership in equal shares from the 1st September, 1806, to January, 1819; and he submitted that he was entitled to half of the profits of the partnership concern.

The respondent, on the 29th of January, 1819, and before putting in his said answer, made an affidavit in support of a motion in the cause. That affidavit, as far as it is material to be here stated, was to this effect: "That he (the respondent) and A. Toulmin, the testator named in the pleadings, became concerned together as copartners in the business of navy agents in 1806, and continued so concerned together until the death of the said A. Toulmin on the 4th of January,

1819; and that it was on the formation of such copartnership in the first instance, agreed between this deponent and the said A. Toulmin, that upon A. Toulmin's bringing into the copartnership between him and deponent 40,000*l.* of good debts, which were owing to the late concern carried on in partnership between the said A. Toulmin and Richard Toulmin, for the purpose of meeting the claims by debts transferred from the said firm, and upon deponent's bringing 4000*l.* into the said partnership concern between him and the said A. Toulmin; A. Toulmin should be entitled to two-thirds of that concern, and deponent to the other third;

* 685 but the said A. Toulmin not being able to *bring 40,000*l.* of good debts into the partnership, it was afterwards agreed between deponent and the said A. Toulmin, that they should carry on their said partnership business upon equal terms as to profit and loss, and they did accordingly so carry on such trade or business; and the said A. Toulmin and deponent never came to any settlement of accounts together touching the said partnership concern, but all accounts from the commencement of such partnership were, at the time of the death of the said A. Toulmin, open and unsettled.

The governor and company of the Bank of England duly put in their answer to the bill, and the same was ordered to be dismissed as against them, in February, 1827.

The cause being at issue between the appellants and respondent, several witnesses were examined, and a great deal of documentary evidence also was adduced on both sides. The substance of the evidence is hereinafter stated.

The Lord Chief Baron, on the hearing of the cause in June, 1828, ordered it to be referred to the Master to inquire whether the said A. Toulmin brought into the partnership of Toulmin and Copland 40,000*l.* of good debts due to the partnership concern of R. and A. Toulmin, according to the true intent and meaning of the agreement stated in the respondent's affidavit, upon the footing of which the late partnership commenced, and to inquire whether the said agreement was at any time after the commencement of such partnership varied or altered; and if on making those inquiries, it should

be found that A. Toulmin brought in the 40,000*l.* of good debts as aforesaid according to the said agreement, and that the agreement was not afterwards varied, then the said late partnership * was to be considered as in * 686 thirds, the respondent taking one-third only, and the accounts should be taken on that footing; and in that event the Master was directed to take an account of what, if any thing, was due to the appellants as the legal personal representatives of A. Toulmin for two-third shares of the profits of the partnership, and to take an account of what was due to the respondent for one-third. And if it should be found that A. Toulmin brought into the said partnership the said 40,000*l.* according to the true intent and meaning of the said agreement, and that the agreement was afterwards varied or altered, then the Master was to take the accounts of the partnership profits on the footing of such altered agreement. But if the Master should find that A. Toulmin did not bring into the partnership of Toulmin and Copland the said 40,000*l.* of good debts of the old firm, then he was to take the accounts of the partnership between A. Toulmin and the respondent on the footing of a partnership in equal shares. And the Master was at liberty to make a separate report on any of the matters so referred to him.

The material parts of the evidence read on behalf of the appellants on the hearing, previous to this order of reference, consisted (besides the respondent's affidavit before stated) of the depositions of Mr. S. S. Toulmin, solicitor for the appellants, and of Mr. R. Reynolds, a customer of the firm of Toulmin and Copland, in answer to interrogatories. The former deposed in substance, that in the summer of 1827, he examined the books of account of the firm of R. and A. Toulmin, from February, 1796, to the 31st of August, 1806, for the purpose of ascertaining what profits or losses had been made or sustained by that firm; and he found clear profits during that period amounting to * 27,974*l.* aver- * 687 aging yearly about 2,650*l.* He at the same time examined the books of account of the late firm of Toulmin and Copland, for the purpose of ascertaining the amount of Cop-

land's capital therein: he found that these accounts were generally balanced on the 31st of August in each year, and that the largest amount of Copland's capital at any period was 4,880*l.* He further examined those books for the purpose of ascertaining whether the late firm paid or received any moneys on the account of the firm of R. and A. Toulmin; and he found that Toulmin and Copland received the sum of 56,037*l.* on account of debts to R. and A. Toulmin, and paid 38,624*l.* on account of debts due from R. and A. Toulmin; that 31,796*l.* of the said 56,037*l.* had been received by the 1st of September, 1807, and a further sum of 8,575*l.*, other part of the said 56,037*l.*, had been received by the 1st of September, 1808. Mr. Reynolds deposed to a conversation which he had with the respondent in April, 1819, on the subject of the disputes between the latter and the appellants, and in which the respondent said that he had only brought 4000*l.* into the concern; that one Roper also brought in 4000*l.*, and that respondent was to receive one-third part of the profits; that on deponent's observing that he understood respondent claimed half, respondent replied that the executors (meaning the appellants) offered to allow him four-ninths, and deponent might tell Mrs. Toulmin (the appellant) that that proportion of the profits would satisfy the respondent, and would settle every thing in dispute between them.

The additional evidence for the appellants produced before the Master, for his inquiries under the said order of
 * 688 reference, consisted of extracts from the books * of account of the partnership of Toulmin and Copland; of affidavits of the said S. S. Toulmin, and of a record of a judgment hereinafter mentioned. The accounts in effect showed that the partners were in the habit of drawing money from the partnership funds for their private purposes, and that where they were separately indebted to the same individual on their private respective accounts, such several debts were sometimes paid by a partnership check on the partnership bankers, and the amount so paid for either partner was debited to his private account. The books of account further showed the mode of transferring the debts due to and from

the firm of R. and A. Toulmin, and of keeping and balancing the accounts.

The affidavits of S. S. Toulmin, sworn the 6th and 22d of July, 1829, and the 15th February, 1830, stated that the deponent carefully examined the books of account of the firm of Toulmin and Copland, for the purpose of ascertaining whether that firm ever received, on account of such of the customers of the firm of R. and A. Toulmin as were debtors to such last-mentioned firm, any surplus moneys, after deducting the advances made to such customers by the firm of Toulmin and Copland; and if so, what was the amount of the surplus moneys so received during the first six years of the partnership of Toulmin and Copland, which, if Toulmin and Copland were entitled to deduct such advances, would have been applicable in discharge of the debts due from such customers to the firm of R. and A. Toulmin. And deponent further said, the schedule marked E, produced and shown to deponent, contained, to the best of his knowledge and belief, a full, true, and particular account of such surplus moneys, together with the times when * and the per- * 689 sons from whom or on whose account they were respectively received.

The schedule referred to was entitled "Schedule containing an account of the surplus moneys received by Toulmin and Copland from the customers of R. and A. Toulmin, after deducting the advances made to such customers, from the 31st of August, 1806, to the 1st of September, 1812;" and was added up on the 31st of August in every year, and the amount carried over to the next year; and by such schedule it appeared that the amount of sums received, from the commencement of the partnership of Toulmin and Copland, to the end of each of the following years, was :—

| | £ | s. | d. |
|-----------------------------|--------|----|----|
| 31st August, 1807 | 23,652 | 1 | 4 |
| 31st August, 1808 | 29,897 | 8 | 1 |
| 31st August, 1809 | 34,170 | 16 | 4 |
| 31st August, 1810 | 37,294 | 5 | 1 |
| 31st August, 1811 | 40,070 | 4 | 5 |
| 31st August, 1812 | 42,171 | 19 | 6 |

And deponent said, this schedule was made out by striking a balance, or taking issue, upon every distinct item of receipt and payment, on account of the debtors of the firm of R. and A. Toulmin; and that after the 31st of August, 1812, and before the termination of the partnership of Toulmin and Copland, further moneys, to the amount of 11,481*l.* 19*s.* 1*d.*, or thereabouts, were, upon the principle adopted by deponent in making out the said schedule (in case such principle was in fact applicable), received by the partnership of Toulmin and Copland, on account of the debts which would upon such principle have been due to the firm of R. and A. Toulmin. And deponent said that he had particularly examined the accounts of Captain Douglas and Mrs. Wood-

* 690 meston, in the * account-books of Toulmin and Copland, and it there appeared that on the 1st of September, 1806, Captain Douglas was indebted to the firm of R. and A. Toulmin in the sum of 66*l.*, and that Mrs. Woodmeston was indebted to the same firm in the sum of 54*l.* That deponent examined the account of Captain Douglas, for the purpose of ascertaining what was the balance due from him on the 4th of May, 1809, and whether on that day the firm of Toulmin and Copland had received on his account moneys sufficient to discharge the debt so due from him to R. and A. Toulmin, and also whether on that day Toulmin and Copland had received on his account sufficient moneys to discharge the debt so due from him to R. and A. Toulmin, after deducting the advances made to him by the firm of Toulmin and Copland. And it appeared by the said books, that if the account of Captain Douglas had been balanced on the said 4th of May, 1809, the balance due from him on that day would have been 469*l.* 14*s.*, exclusive of interest from the 1st of September then last; and it also appeared that on the said 4th of May, Toulmin and Copland had received, on account of Captain Douglas, moneys sufficient to discharge the debt due from him to R. and A. Toulmin, but had not received on his account moneys sufficient to discharge the debt due from him to R. and A. Toulmin, after deducting the advances made to him by Toulmin and Copland. And deponent examined the account of Mrs. Woodmeston for the purpose of ascertaining

whether on the 12th of February, 1817, the firm of Toulmin and Copland had received on her account moneys sufficient to discharge the debt due from her to the firm of R. and A. Toulmin, and also whether on that day Toulmin and Copland had received on her account moneys sufficient to discharge the debt * due from her to R. and A. Toulmin, * 691 after deducting the advances made to her by Toulmin and Copland. And it appeared by the said books, that on the said 12th of February, 1817, Toulmin and Copland had received, on account of Mrs. Woodmeston, moneys sufficient to discharge the debt due from her to R. and A. Toulmin, but had not received on her account moneys sufficient to discharge the debt due from her to R. and A. Toulmin, after deducting the advances made to her by Toulmin and Copland.

The affidavits further stated, that Captain Douglas and Mrs. Woodmeston being so indebted to the firm of R. and A. Toulmin, on the 1st of September, 1806, the former in the said sum of 66*l.*, the latter in the said sum of 54*l.*; these debts were afterwards transferred, and the accounts carried on by the firm of Toulmin and Copland, in like manner as the other debts due to the firm of R. and A. Toulmin; and that it also appeared by such books, that on the 30th of October, 1806, the firm of Toulmin and Copland had paid or advanced on the account of the said Captain Douglas several sums of money, amounting in the whole to the sum of 62*l.*, and making, together with the said sum of 66*l.*, the sum of 128*l.*; and that on the same 30th of October, the firm of Toulmin and Copland received on account of the said Captain Douglas the sum of 100*l.*, leaving the sum of 28*l.*, with interest, remaining due from him; that on the 1st of November following, the firm of Toulmin and Copland paid to Captain Douglas the further sum of 452*l.*, thereby increasing the balance due from him to the sum of 480*l.*, which balance was never paid off, though an action was, as deponent believed, brought for it by Toulmin and Copland, as their own property.

The attorney of Toulmin and Copland in that action against Captain Douglas, deposed, in a joint affidavit

* with the said S. S. Toulmin, that the said action was * 692

settled by Toulmin and Copland accepting a warrant of attorney of the said Captain Douglas, with a memorandum indorsed thereon, that it was given for securing the payment to Toulmin and Copland of the sum of 502*l.*, being the balance of accounts due from Captain Douglas to them, together with interest, in manner therein mentioned; and also a memorandum of agreement made between Captain Douglas and Toulmin and Copland, whereby, after reciting (amongst other things) that the said Captain Douglas was indebted to Toulmin and Copland in the sum of 502*l.*, he agreed with them that he, Captain Douglas, should forthwith convey and assign to them, Toulmin and Copland, their heirs, executors, &c., all his estate and interest in premises therein particularly described, as a collateral security for the payment of the said sum of 502*l.* And deponent, S. S. Toulmin, for himself said, that it appeared by the books of account of the firm of Toulmin and Copland, that if the account of Captain Douglas therein contained had been balanced on the 26th of May, 1809, the balance due from him would have been 469*l.* 14*s.*, exclusive of interest from the 1st of September then last past; and that it appeared by the said account of Captain Douglas, that on the 26th and 30th of May, 1809, respectively, the firm of Toulmin and Copland had received, on account of Captain Douglas, moneys sufficient to discharge the debt due from him to the firm of R. and A. Toulmin, and had not, on either of the said two last-mentioned days, received on his account moneys sufficient to discharge the debt due from him to the firm of R. and A. Toulmin, after deducting the advances made to him by the firm of Toulmin and Copland.

The warrant of attorney and agreement referred to

* 693 * in the affidavits were produced and verified before the Master, as was also an affidavit of the respondent, who therein swore, in order to hold Captain Douglas to bail in the said action, that he, Captain Douglas, was indebted to him and A. Toulmin, his partner, for work and labour performed by them as navy agents, at his request, and for money lent, commission, interest, &c. The record of the judgment produced before the Master was of an action in the Court of

Exchequer, in which Toulmin and Copland recovered against Mrs. Woodmeston the before-mentioned debt of 32*l.* due from her. (These documents were put in evidence for the purpose of showing that Toulmin and Copland dealt with the debts due from debtors of the old firm, as if they had become debts due to themselves.)

The evidence for the respondent consisted of depositions of witnesses, in answer to interrogatories, with exhibits of accounts, of office copies of proceedings in the Court of Chancery in the matter of lunacy of R. Toulmin, the former partner of A. Toulmin; and of affidavits. The depositions of the witnesses, as far as it is material to state them, were as follows: John Edmonds said, he went into the employment of Toulmin and Copland in 1812, as clerk, and continued in it to the death of A. Toulmin in 1819; that during the whole period of his employment he had the care of the partnership books, under the superintendence of the principals; that A. Toulmin, who more particularly attended to the books, told deponent in 1813 that the debts due to the firm of R. and A. Toulmin had been by him transferred to the books of Toulmin and Copland, but that Copland was not to be responsible for such debts so transferred, as he, A. Toulmin, caused them to be placed in such books, * in order to facilitate * 694 the recovery of them; and that all advances made by Toulmin and Copland, to customers of the old firm of R. and A. Toulmin, were to be deducted from the first remittances or receipts on account of such customers of the old firm respectively. That he always considered and believed A. Toulmin and respondent to be joint and equal partners, and in no case, to deponent's knowledge, did it appear from the partnership books to the contrary; but that, in all cases where any division had taken place as to the partnership dealings, such division was in equal moieties. That in December, 1814, respondent directed deponent, in the presence and hearing of A. Toulmin, to balance the partnership books, and carry over half of the profits to A. Toulmin's account, and the other half to respondent's account; and A. Toulmin did not express any dissent or disapprobation of such directions, which the pressure of business alone prevented deponent from carrying into

effect, and the said accounts remained unbalanced as to profits and loss down to A. Toulmin's death. The deponent verified several entries, in his own handwriting, in the partnership books, relating to losses in several stock transactions, sustained by the partnership in 1814 and 1815, showing that one moiety of each of such losses (viz., 184*l.*, 521*l.*, 206*l.*, and 318*l.*, in 1814; and 81*l.*, 171*l.*, 162*l.*, and 78*l.*, in 1815) was, by direction of A. Toulmin, debited to his account, and the other moiety was debited to the account of the respondent. Deponent also referred to three several entries under the head, "House Expenses," in the partnership books, relating to purchases of wine, from 1812 to 1816, and showing that the payments were made out of the partnership funds; and deponent heard and believed that these wines were sent in

* 695 * equal moieties to the separate private residences of the partners. Deponent verified an account in his own handwriting, commenced in 1812, under the direction of A. Toulmin, and continued in 1813, and said the same was made out for the purpose of showing the actual receipt of money by Toulmin and Copland on account of the debts due to the old firm of R. and A. Toulmin; and it appeared from it that all advances of money by Toulmin and Copland to persons who were indebted to the old firm were deducted from the first receipts from such persons; and in all cases where the receipts exceeded such advances, the excess alone was carried to the credit of the firm of R. and A. Toulmin.

John Harrison, an accountant, deposed that he had been employed by the respondent to examine the partnership books. He investigated the accounts contained in them; and it did not appear from any of them that the profits of the partnership business were ever ascertained and carried into the account of the partnership to the credit of the partners, at any period during the continuation of the partnership; although it appeared that the moneys drawn out by the partners respectively were regularly carried to their separate accounts. This witness confirmed the depositions of Edmonds, as to the equal division of the losses on the stock transactions of the partnership, and as to the equal division of the wines; and he deposed, that from his careful examina-

tion of the accounts, his opinion was that Toulmin and Copland were partners in equal shares ; and that it was impossible for any person conversant with accounts to arrive at any other conclusion, from the evidence afforded by the partnership books. Five other witnesses, examined on interrogatories, supported the depositions of the first * witness, particularly as to the equal division of the * 696 wines.

The documentary evidence consisted of proceedings in the Court of Chancery on a bill filed by R. Toulmin, the lunatic, by his committee, against A. Toulmin. That bill prayed an account of the partnership dealings of R. and A. Toulmin, and of the profits thereof since R. Toulmin became a lunatic. The answer of A. Toulmin contained passages to this effect: That he was unable to meet with a proper person, able to advance a sufficient sum of money for carrying on the concern until July, 1806, when he met with Copland, who agreed to become a partner in the said business of a navy agent, from the first of September following, and to bring in a sufficient sum of money for the purposes of carrying on the same. That he, A. Toulmin, thereupon sent circular letters to the customers of the late partnership, to inform them of R. Toulmin having agreed to withdraw from the copartnership, and soliciting a continuance of their agency concerns with the new partnership of Toulmin and Copland. That in compliance with such circular letters, he, A. Toulmin, and said Copland were appointed by most of the connections of the late partnership to act as agents for them ; and he and Copland accordingly commenced their said partnership business, from the first of September, 1806, and ever since carried on the same ; and Copland had at different times advanced moneys for the purpose of carrying on the said copartnership, to the amount of 7000*l.* and upwards ; whereby, and by his, A. Toulmin's, own private moneys, he had been enabled to carry on the said business, and to discharge the greater part of the debts outstanding and due from the said late partnership at the time of the termination * thereof. * 697 That the accounts of the said late partnership were all balanced up to the 31st August, 1806, when all the said late

partnership concerns ceased and terminated. That since the said 31st of August he had paid considerably more than he had received on account of the said late partnership; and that no part of the property or moneys of the said R. Toulmin had been employed in the carrying on of the said business, which had been so carried on by him, A. Toulmin, and Copland, since the said 31st of August, 1806.

By different schedules annexed to his answer, A. Toulmin stated, that he had received, since the 31st of August, 1806, and up to the 31st of August, 1807, on account of the outstanding debts due to the firm of R. and A. Toulmin, the sum of 15,217*l.* 4*s.*; and that he had paid, since the 31st of August, 1806, and up to the 31st of August, 1807, on account of debts owing by the said firm of R. and A. Toulmin, the sum of 22,410*l.* 18*s.* 6*d.*

The further documentary evidence produced on behalf of the respondent was a report of Master Alexander, dated December, 1814, and made in pursuance of an order of the Lord Chancellor, on a petition in the lunacy, to take an account of the partnership dealings of R. and A. Toulmin. The Master certified (among other things) that the new partnership of Toulmin and Copland opened a new set of books from the 1st of September, 1806, in which they stated the debts due from several persons therein mentioned as debts due to the partnership of R. and A. Toulmin; and that when money was received on account of any of such debtors, a balance was struck in the said books at the time

of making up the yearly accounts, and the sums remaining due carried on as debts due to the * new partnership of Toulmin and Copland, and afterwards the account was carried on in the usual way by receipts and payments as between the several persons and the new firm. And the Master was of opinion, that whatever sums had been actually received under the circumstances, should be carried to the account of the debts due to the old firm, without giving the new firm credit for their new advances to the several debtors, until the old debts should be satisfied; and that A. Toulmin should be charged with such receipts as between him and R. Toulmin. He further certified, that he

had taken the accounts on that principle ; and he found that the debts due to the firm of R. and A. Toulmin on the 31st of August, 1806, together with interest thereon, at that time amounted to 66,096*l*. That the several sums received since that time by Toulmin and Copland, on account of such debts, amounted to 54,641*l*., with a moiety of which, viz., 27,320*l*. 10*s*., he charged A. Toulmin, for R. Toulmin's share of the said debts ; and that of the said sum of 66,096*l*., debts due to the old firm, 11,455*l*. were then (June, 1814) still outstanding, one moiety whereof, when received, would belong to R. Toulmin. The Master also certified, that the debts due by the old firm at its dissolution on the 31st of August, 1806, amounted to 37,056*l*., all of which were since paid by the new firm. Giving A. Toulmin credit for half that sum (viz., for 18,528*l*.), and adding to it one-half of sundry advances made by A. Toulmin on behalf of the lunatic, and deducting the aggregate amount from the said sum of 27,320*l*. 10*s*. charged against A. Toulmin, the Master found that the sum of 4,732*l*. was then (June, 1814) due from A. Toulmin to R. Toulmin, upon the balance of the accounts of their partnership dealings.

* Objections taken by A. Toulmin to the Master's * 699 report, and several affidavits made by him in support of the objections, were also put in evidence for the appellants. The objections were to the principle on which the Master took the accounts ; and it was insisted that, instead of carrying the sums received by Toulmin and Copland from the debtors of the old and new firms, to the account of the debts due to the old firm only, without giving Toulmin and Copland credit for their advances until the old debts should be satisfied, the Master should have certified that the sums received from such debtors should be carried to the account of the debts due to the old firm, after giving credit in the first place to Toulmin and Copland for their advances. The affidavits set forth that it was the invariable custom of navy agents to advance money to their customers, for the purpose of securing their agency, and thereby enabling the agents to repay themselves the moneys due from such customers : That in several interviews which deponent had with the committee and solicitor of the

lunatic in 1806 and 1807, they approved of deponent's making advances to the customers indebted to the old firm, for the purpose of ultimately obtaining payment of the old debts; and that it was under that impression, and on the express condition of being allowed to reimburse himself out of the first moneys received by him and his partner on account of such customers, that deponent and his partner were induced to make advances to them; his sole view being to retain their agencies, in order that he might be able to discharge, out of the moneys coming to them from time to time, the debts due by them to the old firm: That in many instances in which

deponent and his present partner had received moneys * 700 on account of officers for whom they * were agents, it had been upon a previous and express understanding that deponent and his said partner were to make advances throughout on account of such officers respectively, and not apply such receipts to the discharge of the balances respectively, owing from them to the late partnership of R. and A. Toulmin; and in many instances deponent and his present partner had been called upon to accept bills by way of anticipation of the moneys so to be received: in which cases, if deponent and his said partner had refused to accept such bills, they would have been prevented by such officers from receiving the moneys so coming to them. And deponent and his said partner, on their accepting the said bills, had been directed by the said officers specifically to appropriate the said moneys to be received by them to the payment of such their acceptances; and in various other instances deponent and his said partner had been under the necessity of making payments, in order to the receiving the pay due to the officers; such as the expenses of letters of administration and the like.

(This summary of the evidence produced before the Master and the Court below is extracted from the appendixes to the printed cases of the parties to this appeal.)

The Master to whom this cause was referred, by his separate report, bearing date 26th May, 1830, and made in pursuance of the said order (a) of June, 1828, after stating the

(a) *Vide* p. 685, *supra*.

evidence produced before him by the appellants and respondent, found that the said A. Toulmin and the respondent became concerned together in 1806, as copartners in the business of navy agents; and that they continued to be concerned together as such copartners until the time of the death of the said A. Toulmin, which happened on * the * 701 4th of January, 1819. And he found that it was on the formation of such copartnership, in the first instance, agreed between the respondent and A. Toulmin, that upon the said A. Toulmin bringing into the copartnership between him and the respondent 40,000*l.* of good debts, which were owing to the late concern carried on in partnership between the said A. Toulmin and R. Toulmin,—and which was for the purpose of meeting the claims by debts transferred from the said firm,—and upon the respondent bringing 4000*l.* into the said copartnership concern between him and the said A. Toulmin; the said A. Toulmin should be entitled to two-thirds of that concern, and the respondent to the other one-third. And he found that the said A. Toulmin did not bring into the said partnership of Toulmin and Copland the said 40,000*l.* of good debts, according to the true intent and meaning of the said agreement, as stated in the said affidavit of the respondent, sworn in this cause on the 29th of January, 1819. And he certified that he had directed the accounts to be taken on the principle contended for on the part of the respondent, viz., in equal moieties; and he further certified that his finding that the said 40,000*l.* of such good debts as aforesaid was not brought into the said partnership of Toulmin and Copland, according to the true intent and meaning of the said agreement, having been the subject of objection by the appellants, and having been requested by them to make a separate report of such finding, in order that the opinion of the Court might be taken touching the same, he had thought fit to make that his separate report accordingly; and that he had forborne to take the account directed by the said decree, on the footing of the said A. Toulmin and the respondent having been partners in equal * shares, until the * 702 Court should have decided upon the said objections to his said finding; inasmuch as in the event of such finding

being overruled by the Court, the so taking such account would have occasioned a very great and unnecessary expense to all parties.

The appellants took two exceptions to that report: first, that the Master ought, instead of the above finding, to have found that A. Toulmin did bring into the partnership of Toulmin and Copland the said sum of 40,000*l.* of good debts, according to the true intent and meaning of the said agreement as stated in the respondent's said affidavit; secondly, that the Master ought not to have directed the accounts to be taken on the principle of equal moieties, but on the footing that A. Toulmin was entitled to two-third parts or shares thereof, and the respondent to the remaining one-third.

The first of these exceptions came on to be heard before the Lord Chief Baron, who by an order bearing date 21st December, 1830, overruled the same and confirmed the report. (a)

The appeal was against that order.

(a) The following is a note of the judgment:—

SIR WILLIAM ALEXANDER, L.C.B. — The question in this case is, as I understand it, whether Mr. Copland is, upon the evidence before the Court, to be held entitled to one-half or one-third of the profits made during the continuance of this partnership between him and his late partner Abraham Toulmin. Upon reference to the Master respecting the facts, he was of opinion that Mr. Copland was entitled to half the profits; and it is to that opinion that the exception which has now been argued was taken. I do not well know the form of the exception, whether it was to the allowance of one-half the profits, or to the bringing in of the 40,000*l.* according to the meaning of the agreement.

It appears that Mr. Toulmin and Mr. Copland carried on their partnership under circumstances so loosely expressed, that if it had not been for some collateral evidence entered into in the cause, we should have been left with general presumptions only to deal with, which general presumptions would unquestionably have given to Mr. Copland a moiety of those profits; for I take it, that when two persons agree, without any articles and without any apparent stipulation, to carry on a business or trade together, it is presumed they are interested in equal moieties until that presumption is displaced by actual evidence of the fact: such I take to be the rule. Now with that advantage in Mr. Copland's favour, nothing appeared originally against that hypothesis but the evidence derived from his own affidavit, and that is expressed in these words: "It was on the formation of such copartnership, in the first instance agreed," &c. [His

* *The Solicitor-General* (Sir C. C. PEPYS) and *Mr. * 703*
Simpkinson, for the appellants.—The exceptions to the

Lordship read that part of the affidavit, as above, p. 684.] Now that is the passage, aided by certain collateral testimony, upon which the whole case turns. There are stated, in fact, two agreements, or that which amounts to two agreements; a second agreement, which was the continuation of the first.

I conceive that upon the terms of the original agreement, the position taken on the part of those who sustain this report, could never have been maintained without a great deal of satisfactory evidence; because, when a partner is admitted into an old concern, and stipulates that a certain sum, not of money, but of debts, shall be brought into that partnership, — which debts, from the nature of them, could not be realized immediately, which could be realized only by application, by a great deal of management, and by making fresh advances, — it is impossible to conceive that parties could mean the sum of money to have been immediately brought in, or that there should be a sum of money speedily realized from those debts, contrary to the nature of the transactions. I am persuaded, that if such a stipulation were comprised in a written instrument or in a letter, it would be a perfectly sufficient compliance to bring into the partnership a certain sum of debts apparently good; and would be better, if it appeared in after times, and no very near time, that that sum had been actually realized. That depends both upon the construction which the agreement would receive and the facts which followed; and it appears to me, that if it stood only upon that contract, and upon the facts which now appear, I should have been obliged to overturn the report; but I am not about to do so, for the reasons I will now state. It appears to me in justice, when I have nothing to displace the common presumption with respect to the rights of these parties, but the language of one of the parties himself, that in using the whole of that language, I am bound in justice to give it its full effect; and if so, then I find Mr. Copland immediately afterwards in this transaction swearing positively that Mr. A. Toulmin had not, according to the express terms of this agreement, brought in the 40,000*l.*, and that he did by a fresh agreement consent to give Mr. Copland a moiety of this concern, and that he should have a moiety of the profits. When I have nothing upon this transaction but the evidence of Mr. Copland, I am bound to give weight to the whole of that evidence: in the same affidavit in which Mr. Copland admits that which would turn him out of court in one event, when he adds to it a new contract, by which under the circumstances he was entitled to one-half, I think it due to justice to give all weight to his words, without regarding the interest which he has in the question; as this is used as evidence against him, it is but justice it should be used as evidence for him. Now the question is, how far the assertion is supported by the collateral testimony? and really one cannot help expressing surprise that one does not find in the books of account more distinct traces of what the

Master's report were supported by the evidence laid before him, and he ought to have found in the affirmative; that is, that the 40,000*l.* of good debts had been brought into the new firm, from the debts due to the firm of R. and A. Toulmin. The Lord Chief Baron had, as appeared from his judgment, by mistake, considered the question on the exceptions to be, as to the proportions of the business and profits to

interests and understanding of the parties were; it is truly marvellous that for so many years the business should be carried on, and yet nothing but an obscure trace upon the subject can be derived from these books. I think, however, that there is some collateral testimony. In the first place, two gentlemen have been examined, Mr. Edmonds and Mr. Reynolds, who, I think, give different accounts of this transaction. Mr. Edmonds says he was desired by Mr. Copland, in Mr. A. Toulmin's hearing, to make out a statement of the concern, allowing to Mr. Copland a moiety of the profits. That, to be sure, was at a late period, but at a period before the present question arose, and affords very strong evidence in favour of that proposition. On the other hand, the other witness says Mr. Copland told him that he was entitled only to one-third, that he was offered four-ninths, and would be satisfied with that share. That conversation strikes my mind as of much less importance than the other. I do not know what was passing upon that occasion, or whether Mr. Copland might not be saying, "I once had a third;" it is very loose; but the other is of a more distinct and connected character; it was a positive direction to do the most important act upon this subject, and affords direct evidence upon it. I do not place great weight upon a circumstance like this loose conversation with Reynolds, the whole particulars of which we may not have before us. There is much greater weight to be given to that other conversation upon which I am now relying; but I confess I am at all times more disposed to rely upon any evidence which appears by writing, and from which I think a safer inference can be drawn. With respect to that particular transaction of Mr. Morgan's loan (relating to the losses in the stock transactions), I was not able to follow the plaintiff's counsel in his observations, which were meant to have the effect of setting at nought any inference to be drawn from that transaction. I think it does show that the expense of borrowing a large sum of money which was actually owing in this partnership, was carried equally to the separate account of these two partners; and I cannot account for that expense being so carried in moieties, except upon the hypothesis that at that time they were concerned in equal proportions; I cannot understand it in any other way. I apply this as a collateral fact, tending to confirm and support the weightier evidence in the case. It appears to me, therefore, that the opinion which the Master has formed is the accurate one, and that this exception must be overruled.

which the partners were entitled. The appellants were bound to take both exceptions, the second as necessarily flowing from the first; the chief question arose on the first exception, but it was evident that the Master and the Lord Chief Baron drew a wrong conclusion from the premises before them. The Lord Chief Baron held that persons entering into partnership, without any agreement as to their respective * shares, would be equally entitled. * 704. That position is not controverted by the appellants. Here, however, * there was an express agreement, as * 705 appeared from the respondent's affidavit; by that agreement one * partner was to bring in 40,000*l.* of * 706 good debts of the former firm; good debts exceeding that amount were brought in within a reasonable time. These were good debts, and were so treated by the firm of Toulmin and Copland; and in one way, the true way, of taking the accounts, they were to be deemed to have been brought in within a reasonable time.

By the agreement contained in the respondent's affidavit, A. Toulmin was not bound to bring into the concern any capital of his own. But the evidence in the cause showed that he did bring in a very considerable capital, which consisted of a moiety of the moneys received by Toulmin and Copland on account of the debts due to R. and A. Toulmin. That moiety, after deducting from the whole sum brought in the moneys paid for debts due from R. and A. Toulmin, amounted to several thousand pounds. It appeared that on the 1st of September, 1806, Toulmin and Copland opened for themselves a new set, of books, into which they transferred debts due to R. and A. Toulmin to the amount of 60,000*l.*, or thereabouts, and which debts when transferred were therein stated to be due to R. and A. Toulmin, and the accounts so transferred were always afterwards carried on in the books of Toulmin and Copland, as the accounts of Toulmin and Copland alone, though they included the balances belonging to the firm of R. and A. Toulmin. The firm of Toulmin and Copland from time to time received and paid moneys on such different accounts, and struck balances thereon, and the sums remaining due at the time of such balances being struck

were carried on as debts due to Toulmin and Copland ; and afterwards the accounts were carried on by receipts and payments in the usual way, as between the said debtors * 707 and the firm of Toulmin and Copland. * Toulmin and Copland not only treated such accounts as their own, but also brought actions in their own names against several of such debtors, for the whole balances due from them at the respective times when such actions were brought ; instances of which are given in the evidence. The evidence showed, that if the advances made by Toulmin and Copland to the debtors of R. and A. Toulmin were not to be paid out of the moneys received from such debtors till the debts due to R. and A. Toulmin, from such debtors, had been discharged, then good debts to the amount of 56,037*l.*, owing to the firm of R. and A. Toulmin, had been brought into the firm of Toulmin and Copland ; and 40,000*l.* and upwards of such debts were brought by A. Toulmin into the firm of Toulmin and Copland, before the 1st of September, 1808. If the advances made by Toulmin and Copland to the debtors of the firm of R. and A. Toulmin were to be paid out of the moneys received from such debtors, in the first place and before the debts due to R. and A. Toulmin were discharged, then good debts to the amount of 53,653*l.*, owing to R. and A. Toulmin, had been brought into the firm of Toulmin and Copland, and 40,000*l.* and upwards of such good debts were, on the last-mentioned supposition, brought by A. Toulmin into the firm of Toulmin and Copland, before the 1st of September, 1811. The evidence also showed, that the firm of Toulmin and Copland had paid debts owing from the concern of R. and A. Toulmin, to the amount only of 38,624*l.*

By the mode of taking the accounts contended for by the respondent, 40,000*l.* of the old debts were not brought in at all ; at least he insisted that they were not brought in within six years. In taking accounts of debts and payments, * 708 the oldest debts should be * considered as first discharged : that was the practice, and it was supported by the authority of cases.

THE LORD CHANCELLOR. — The established rule is, that
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where there is no special contract or direction to appropriate payments made, the first debts are held to be first paid. That is also the reasonable practice, for otherwise they might be barred by the Statute of Limitations. There is a decision to that effect; *Clayton's Case*, *Devaynes v. Noble*; where another decision to the same effect, *Ex parte Toulmin*, is stated in a note. (a)

Mr. Knight and *Mr. G. Richards*, for the respondent. — The Chief Baron could not have fallen into the mistake imputed to him; he had a particular experience in this case, for he was the Master to whom all the inquiries in the suit and lunacy of R. Toulmin were referred, and part of whose report on these inquiries were evidence in this case. Could any person doubt that, if it were not for the respondent's affidavit, this partnership should be considered in equal moieties? The most curious part of the case was, that the Lord Chief Baron did not notice that part of the affidavit which supported the respondent's case: "But A. Toulmin not being able to bring in the 40,000*l.* of good debts, it was afterwards agreed between them that they should carry on the partnership business on equal terms," &c. It was, however, clear from the other evidence in the cause, that the partnership was in equal shares.

[THE LORD CHANCELLOR. — There appears to be a discrepancy between the respondent's answer and affidavit; in one he states the agreement to be in the alternative, but at one and the same time; whereas in the other he puts two distinct * agreements.] * 709

The affidavit is not a narrative of a written agreement, but a recapitulation of a subsequent agreement.

The respondent was willing to confine himself to the agreement to bring in the 40,000*l.* good debts. It was manifest from the appellant's statement, and from the conduct of the parties in the manner of bringing in these debts, that they had no definite meaning as to that part of the agreement. The former partnership of R. and A. Toulmin was in equal

(a) 5 Madd. 600.

shares; the new partnership was intended to be on the same footing, nothing being understood of unequal shares, except in the case of the 40,000*l.* being brought in, and that within a reasonable time.

[LORD WYNFORD. — Suppose these debts of 40,000*l.* were brought into the new concern in sufficient time to meet the debts owing from the old firm, would not that fulfil the intent of the agreement?]

The testimony of the witnesses and the documentary evidence produced by the respondent before the Master, and acted upon by the Master, showed that the debts of the old partnership of R. and A. Toulmin were only transferred into the books of the partnership of Toulmin and Copland nominally, and for the purpose of facilitating their recovery, and that they never were assumed by that firm; and, in fact, it was never even in the contemplation of A. Toulmin or the respondent to assume them; the evidence also showed, that the understanding and agreement of A. Toulmin and the respondent, in regard to the appropriation of the moneys, subsequently to the formation of the partnership of Toulmin and Copland, received or to be received from customers whose debts were transferred, was, that the new partnership of Toulmin and Copland was to reimburse itself the

* 710 advances made by it to customers, out of the * first moneys received from such customers, and that the surplus, if any then remaining, was to be applied in the liquidation of the old debts of such customers. The evidence likewise showed that 40,000*l.* of good debts had not been brought into the partnership of Toulmin and Copland, according to the true intent and meaning of the agreement stated in the affidavit of the respondent, nor within six years next after the 1st of September, 1806, which was not a reasonable time, nor such a period as the purposes and objects of the agreement required. The respondent contends that it must be held to have been agreed, that the 40,000*l.* was to be brought in within a reasonable time, due regard being had to the purposes and objects for which the same was required.

It also appeared from the payments which were made by the firm of Toulmin and Copland in various ways, that they conceived themselves to be partners in equal shares. The wine, for instance, which may be considered substituted for profits was equally divided, not on one or two occasions, but several times, and in large quantities. That point ought to have some weight as showing how all the profits were to be divided. But not only the profits, but the losses also, were carried to the account of each partner in equal shares. That was proved by the several exhibits in the Court of Exchequer, especially by the exhibits of the accounts with Messrs. Morgan, the brokers of the firm of Toulmin and Copland, from which it appeared that the several losses and expenses attending the stock transactions of the firm were divided equally, one-half being carried to the separate account of each partner. This equal division of the losses of the firm showed that it was Mr. Toulmin's understanding of the partnership terms, that the profits also should * be equally * 711 divided; for there could be no greater injustice than to charge Copland with half the losses, and give him only one-third of the profits. From the evidence in the cause, it was impossible to hold that 40,000*l.* of the old debts were brought into the firm, so as to be available according to the true intent and meaning of the partnership agreement. That was a question of fact, referred to the Master to ascertain, and he found in favour of the respondent. The case was very carefully considered by the Chief Baron, and he confirmed the Master's report.

The Solicitor-General, in reply, said, the only question disputed before the Master was, whether the 40,000*l.* had been brought in within a reasonable time. On that point the appellants were entitled, upon the clearest evidence, to the judgment of the House, against the finding of the Master, whose report was opposed to the facts as proved.

May 30.

LORD WYNFORD. — My Lords, in this case the chief point that is raised for our consideration, is whether the 40,000*l.*

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had been brought into the new firm according to the tenor of the agreement. The Master has reported—and the late Lord Chief Baron has confirmed that report—that the 40,000*l.* had not been brought in. I cannot help thinking, upon the evidence, that it had been brought in. There is no period stipulated within which that sum of debts was to be brought in; and the meaning of bringing the 40,000*l.*—which I take from the learned counsel who have argued this case on the part of the respondents,—the meaning of bringing it in was the assigning of 40,000*l.*, the amount of debts which at the time of the assignment were good. An assignment of debts is not an assignment of the money, but

* 712 an assignment of that which * is a good claim to money, to come in at some time or other. As I understand the case, the whole of the 40,000*l.* was paid in within five years. The debts were good or they would never have been paid; they existed at the time of the original agreement. But I cannot help thinking also that the 40,000*l.* may be considered to have been realized differently; for there had been advances, and it is not clear that the 40,000*l.* had not been realized at a very early period. It was certainly equally to the advantage of Mr. Copland that this money should be applied to the demands of the new customers, as that it should have been applied for the purpose of paying off the old debts; or perhaps more so, for the house could not have gone on unless the customers had been accommodated in some manner; it could not have gone on but for the realization of this fund.

I was for some time puzzled by a very ingenious argument addressed to your Lordships, that the 40,000*l.* was paid in, not on account of the old debts, but of the pay of officers and of other moneys due to the house of Toulmin and Copland; but that is not so, because, looking at the evidence in the affidavit of S. S. Toulmin, (a) and the schedule which is annexed to that affidavit, it appears that those were not payments made on account of the customers from time to time, but payments made to satisfy debts existing, due from the

(a) See pp. 688 and 689, *supra*.

customers to the house at the time of the dissolution of the partnership of Toulmin and his brother. It appears by that schedule, that certainly within five years, at all events, the whole 40,000*l.* was realized. If the other mode of considering the case was the true one, the whole sum was realized at a much earlier period. But it appears to me that the period of realization is not the question, but whether there were *40,000*l.* of good debts assignable at the time *713 that the partnership took place; and that there were is perfectly clear, or the money that was realized afterwards, would never have been realized. With the greatest respect, therefore, for the judgment of the late Lord Chief Baron, I think that an erroneous view was taken by him of this case; and therefore I shall move your Lordships that this judgment be reversed, or rather the appeal allowed.

THE LORD CHANCELLOR. — My Lords, I take the same view of this case with my noble and learned friend. Your Lordships may have perceived from some observations on interlocutory matters which I suggested, that that has been the view of the case which I have entertained throughout. It was necessary, however, to hear the learned counsel for the respondent, because they might have shaken the opinion I had formed upon the subject; but that opinion has been confirmed by that which I thought it my duty to do, subsequently to the hearing of the first counsel for the respondent, who led, and was heard the other day finishing his address to your Lordships; namely, by reading carefully the printed cases and evidence on both sides. I took the opportunity that evening, when the argument was fresh in my recollection, of going through the whole of these papers; and the result of the whole — considering that argument of the respondent's counsel, and reading the voluminous evidence upon the subject — is, that I have no doubt whatever that the Master came to an unsound conclusion, when he found that the 40,000*l.* were not brought in, in the way in which it was required by the intent and meaning of the agreement.

My Lords, I could have wished that the parties had

* 714 * agreed to the proposal which was made (a) — and which I think was perfectly fair to both parties, and very much for their interests, and which also might have relieved your Lordships as well as the Court below from much very useless, very tedious, unprofitable, and in all probability expensive litigation — not merely to have referred that which now must go back to the Master, whether he will or not, but also that which has been already, I think, adjudicated upon by the Master erroneously, touching the answer to the question put to him in the first inquiry, whether the 40,000*l.* was brought in or not, and which might have been left most safely by the appellants to another mode of adjudication, enlightened, as it probably would be, by the intimation of opinion which those of your Lordships who had attended this case had pretty plainly given. My noble and learned friend having stated that he considered the opinion of the Master to be erroneous, I think it would have been expedient that the whole should have gone together, and not merely this part in which I think there has been a miscarriage in the Court below. The consequence of that proposition not being accepted by the parties is, that it must go back with a direction, that the Court below shall, in the first place, allow the exception to the report: that will adjudicate upon the matter of the 40,000*l.* being brought in. In putting the question, therefore, to your Lordships on my noble and learned friend's motion, in which I entirely concur, I shall propose that your Lordships shall adjudge that the decree shall be reversed, and that the cause be remitted, with a direction to allow

* 715 the exception to the * Master's report; and then that it shall be referred back to the Master to proceed upon the foot of the former decree. We have no other way of doing it, and it is a painful thing to be obliged to do this, which must lead to further expense. This House has given greater facilities for the expeditious, economical, and easy disposing of the case, in a manner peculiarly adapted to such a case, than I ever saw before; I regret for the sake of the parties the failure of the attempt, but I trust the failure will

(a) During the argument their Lordships recommended an arbitration, which was declined.

not prevent your Lordships from repeating the same attempt to other parties, should a case of a similar description arise. His Lordship then put the question, viz., whether it was their Lordships' pleasure that the order of the Court of Exchequer be reversed, and that the cause be remitted to the Court below, with instructions to allow the exception to the Master's report, and so refer it back to the Master, allowing that exception to proceed upon the footing of the former decree? And it was ordered accordingly in the affirmative.

By an order of the Court of Exchequer, dated 3d July, 1834, this order of the House of Lords was made an order of that Court, and the appellants' said exceptions to the Master's separate report of May, 1830, were thereby allowed, and it was referred back to him to revise his report.

The Master, in pursuance of that order, certified by his report, dated 2d July, 1835, that he found that the said A. Toulmin did bring into the partnership of Toulmin and Copland the said 40,000*l.* of good debts owing to the former partnership between A. Toulmin and R. Toulmin, according to the true intent and meaning of the agreement in the decree mentioned. And he further certified, that he found by the evidence before him, that the said agreement was varied and altered after the commencement of the partnership between A. Toulmin and J. Copland; and that it was agreed between them that they should be interested

* in equal shares, and should receive and pay the profits and loss * 716
in equal moieties.

The appellants took exceptions to the latter finding, insisting that, instead thereof, the Master ought to have found by his report, that the said agreement was not afterwards varied or altered; and that he had not found under what circumstances and in what respects the agreement was varied or altered, which he ought to have done.

These exceptions came on to be argued before the Lord Chief Baron; and his Lordship, by an order dated the 27th of February, 1836, allowed the same, and it was thereby ordered that it be referred back to the Master to review his said last report, and to vary and amend the same accordingly.

The Lord Chief Baron, in making that order, said, the House of Lords having decided that the 40,000*l.* were brought into the firm in pursuance of the agreement, the question to be ascertained was, whether there was any alteration of that agreement, the reason given by Mr. Copland for that having failed. If the evidence before Lord Chief Baron ALEXANDER had been sufficient to show that there was a new agreement, he would have so declared without a reference of that question; the evidence being too doubtful on that point, that learned Judge referred the matter, in order to enable Mr. Copland to produce further evidence: no

further better evidence has been produced. If there was any variation of the agreement, it became important to Mr. Copland to establish that by some entries in the partnership books, or by making up the accounts to that effect. If there was any alteration of the agreement, what was the consideration for it? There being no evidence of a new agreement, nor consideration for it, no jury would infer a new agreement from the recollection of the witness Edmonds that fourteen years ago he was directed by Mr. Copland, in the presence of Mr. Toulmin, to make up the books on the footing of an equal partnership. The chief evidence from the accounts, in support of an inference of a new agreement, was the loss on the stock transactions, which were by Toulmin's directions charged to the partners in equal proportions. But these gambling speculations were not in the nature of partnership transactions, and they furnished no evidence of the proportion of interest in the partnership concern. The same observation applied to the division of the wine.

(The suit is still going on.)

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* APPEAL

FROM THE COURT OF CHANCERY.

ROBINSON *v.* ALEXANDER.

1834.

| | | |
|--|---|---------------------------------|
| ISAAC ROBINSON, Surviving Administrator of | } | <i>Appellant.</i> |
| GEORGE ROBINSON | | |
| DANIEL ALEXANDER | | <i>Respondent.</i> ¹ |

Partnership. Merchants' Account. Statute of Limitations.

In 1799, D. A. purchased shares in a ship of G. R., who retained other shares in the same, and was entrusted by D. A. and the other owners with the whole management of the ship, and with the keeping of the accounts. The ship was sold by G. R. in 1805, with the consent of the owners, and he received the proceeds of the sale, and settled accounts with W., one of the owners, to whose credit a balance appeared to be placed, in respect of the earnings of the ship and the proceeds of the sale. In 1826, D. A. filed a bill against the adminis-

¹ S. C., 8 Bligh N. S. 352.

trators of G. R., who died in 1824, for an account of D. A.'s share of the earnings and proceeds of the sale of the ship. In G. R.'s account-books, which appeared not to have been referred to for several years, were two accounts with D. A., one relating to the ship in the way of debit and credit from 1799 to 1805; the other containing two items only, in 1811 and 1812, on the debit side, not appearing to relate to the ship. D. A. was absent from England from 1820, after which time E., his brother-in-law, a witness in the cause, "called frequently on G. R. with messages from D. A., and asked him to come to a settlement of accounts with D. A. in respect to the ship; G. R. evaded the subject, but never stated or intimated that he was not indebted to D. A." *Held*, by the Lords, affirming a decree of the Court below, that D. A. was entitled to an account of the dealings between him and G. R. relating to the ship.¹

May 30, June 2, July 9.

IN March, 1826, the respondent filed his bill in Chancery on behalf of himself and others, creditors of George Robinson, deceased, against the appellant and * John Robin- * 718 son, since deceased, as administrators of the said George Robinson. The bill stated, among other things, that in the month of October, 1799, the respondent purchased of the said George Robinson six sixteenth shares of a ship called the Volunteer, for the sum of 1,687*l.* 10*s.*; and other two sixteenth shares of the same ship, for the sum of 562*l.* 10*s.*, in November of the same year; that respondent paid the full amount of the purchase money for these shares; bills of sale were duly executed to him, and all the regulations of the Ship Registry Acts complied with, so that the respondent was legally invested with the ownership of these eight sixteenth shares in the said ship; that the said George Robinson carried

¹ By the Statute of James, and by the Common Law Procedure Act, actions "for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants," were excepted from limitation, but this exception no longer exists; 19 & 20 Vict. c. 97, § 9; and actions or suits for an account, or for not accounting, must be brought within six years. See 1 Lindley Partn. (Eng. ed. 1860) 372; 2 ib. 822; Collyer Partn. (5th Am. ed.) § 376 & note (5) and cases cited; Bass v. Bass, 6 Pick. 364; S. C., 8 Pick. 187; M'Lellan v. Crofton, 6 Greenl. 308; Mandeville v. Wilson, 5 Cranch, 15; Spring v. Gray, 5 Mason, 528; S. C., 6 Peters, 151; Coster v. Murray, 5 John. Ch. 522; 1 Dan. Ch. Fr. (4th Am. ed.) 640, 641, and notes.

on business in Tower-street, London, as an insurance broker at the time of the said purchase; and he having also certain shares in the same ship, was entrusted by the respondent and the other part-owners with the whole management of the ship and the accounts relating thereto; and he undertook and continued to act as managing owner, and kept all the accounts relating to the ship, from the time when he and the respondent so became joint owners, up to the time when both of them sold their shares in her; and during the period of their joint ownership the ship made considerable earnings, and George Robinson received all the proceeds, but never accounted to the respondent for his share of them; that in January, 1805, George Robinson, with the consent of the respondent and the other part-owners, sold the ship, and received on account of the respondent his share of the money produced by that sale, but died before he had accounted with the respondent for the money received by him in respect of the sale and earnings of the ship. That respondent was

lately informed, that on the occasion of the sale,

* 719 George Robinson settled the accounts between himself and Mr. Charles Wheeler, who was owner of one sixteenth share in the same ship during the period that the respondent was owner of the eight sixteenth shares; and that on that settlement of accounts it appeared that there was due to Wheeler, in respect of the earnings of the ship and proceeds of the sale, the sum of 141*l.* 17*s.* 4*d.* on account of his one sixteenth share, and that balance was accordingly paid to Wheeler by the said George Robinson, soon after the said sale, without respondent's knowledge of the same; that from the time of that sale respondent had frequently applied to the said George Robinson for an account of the earnings and proceeds of sale of the said ship, but could never obtain it, though it was repeatedly promised to him by the said George Robinson; that in November, 1824, George Robinson died intestate; and in December of that year letters of administration of his estate and effects were granted to his brothers, the appellant and John Robinson, who possessed themselves of the personal estate and effects of the intestate to a large amount, and more than sufficient to pay his debts.

The bill prayed that an account might be taken of what was due to the respondent in respect of the matters aforesaid, and that the respondent might be paid what should be found due on settling that account; and that, in case the appellant and the said John Robinson should not admit assets of the intestate sufficient to pay his debts, including what should be found due to the respondent in respect of the matters aforesaid, then that the usual accounts might be taken of the personal estate and effects of the said intestate, received by the appellant and the said John Robinson respectively, or either of them.

* The appellant and the said John Robinson, by their * 720 answer to the bill, stated in substance, amongst other things, that shortly after the intestate's death they possessed themselves of certain books of account, policies of insurance, vouchers, documents, letters, and papers of the intestate; and that amongst them were two letters bearing date respectively 10th of June, 1799, and 27th of August, in the same year, and written by the respondent to the intestate, which contained general proposals on the part of the respondent to become concerned with the intestate in some speculation relating to shipping; that amongst other accounts contained in one of the said books of account, was an account headed, "Dr. Daniel Alexander, Lawrence Pountney-lane.— Contra, Cr.;" and which appeared to be a general account between the respondent and the intestate; and that on the debit side thereof were various items, one of them relating to bills of sale, and others of them relating in express terms to a ship called the Volunteer; and that on the credit side of the account were certain items, some of which related in express terms to the said ship, and others, as the appellant and the said John Robinson believed, relating also to the same ship; that by the said books of account it appeared that the respondent and the intestate were respectively interested in the ship Volunteer from September, 1799, to October, 1804; that the respondent held eight sixteenth shares, and the intestate held four sixteenth shares, and was the managing owner; that the said ship made certain freight, and the same was received by the intestate, but that he paid the outfit and expenses of the

ship, and also the costs of certain investments or adventures in goods shipped on board of her on account of the owners; and that upon two * occasions, viz., after the said ship's first and second voyages respectively, dividends were made and credited by the intestate to the owners of the said ship, in respect of her supposed earnings.

The appellant and the said John Robinson, by their said answer, also insisted that from the state of the accounts of the ship's last three voyages (which they believed to be losing transactions), and of the respondent's first-mentioned account, and particularly as no charge was made to the debit of the respondent in that account, for his share of the losses, outgoings, and expenses appearing by the accounts to have been sustained and expended, the true state of account between the respondent and intestate, upon the close of the speculation relating to the ship, could not possibly be ascertained by reference to the accounts before mentioned; but that if the same could be ascertained by reference to such accounts, they believed that it would either appear that the said account had been long since finally balanced and the balance paid, or that such balance was against the respondent, and in favour of the intestate. And they further said, that from the time when the respondent became interested in the ship, down to the time of the intestate's death, the respondent and the intestate continued to be upon the most intimate terms of friendship, and for more than twenty years of that interval were in constant personal or written communication with each other on their private concerns, in the most confidential manner; and they submitted that all accounts between the intestate and respondent ought, under the circumstances aforesaid, to be considered as closed and satisfied long since.

The appellant and the said John Robinson, by their * 722 answer, admitted assets of the intestate sufficient * to answer what was claimed to be due to the respondent; but insisted that if the respondent ever had cause of action or suit against the intestate, concerning the matters in the bill mentioned (which they in no sort admitted), such cause of action or suit did accrue above six years before suing out process against them to appear and answer the bill; and that the

respondent had not, since such cause of action or suit (if any) arose, been under any disability to commence or prosecute the same.

The cause being at issue, witnesses were examined on both sides; the following is the substance of their testimony: Mr. John Teesdale, the appellant's solicitor, examined to interrogatories on behalf of the respondent, and cross-examined by the appellant and the said John Robinson, proved seventeen different books as exhibits, marked respectively with the first seventeen letters of the alphabet. The first three of them, marked with the letters A, B, C, were stated by the witness to appear to be ledgers; a fourth marked with the letter D, a journal; and all the other books were cash-books, bankers' pass-books, a bill-book, a letter-book, and policy-book. This witness further deposed, that the several produced books had been for a considerable time past in his possession, as the solicitor of the appellant and the said John Robinson; and that, except as to the pass-books, he believed they were kept by the intestate himself, the entries therein chiefly appearing to have been made by him; and that the intestate kept the whole of the produced books in his own custody, at the London Dock-house, in New Bank-buildings. Witness further said, that he had looked upon the folio 34 of the book marked A, and upon folio 42 of the book marked B, and also upon folios 27, 66, 107, and 124 of the book marked A, and that the accounts written on those folios respectively * were writ- * 723
ten by the intestate, as witness believed, he the witness, having seen the intestate write many times, and being well acquainted with his hand-writing; and further, that the several accounts on the said folios 34 of book A, and 42 of book B, were accounts between the respondent and the intestate, (a) and that the several accounts on the said
* folios 27, 66, 107 and 124, of book A. were accounts * 724
between Charles Wheeler and the intestate.

Mr. Thomas England, another witness examined on behalf of the respondent, proved that the said produced books

(a) On the following page is the account in the produced ledgers, marked A, folio 34, and B, folio 42.

belonged to the intestate, George Robinson, and that the accounts referred to were in his hand-writing; and that witness had inspected the two books A and B, also the produced books marked respectively E, F, G, H, and I, the last-mentioned five books being the intestate's banking books; and that he so inspected the said books A and B, for the purpose of ascertaining what balance was due from the intestate to

ACCOUNT IN LEDGER A, FOLIO 384.

Dr.

DANIEL ALEXANDER, *Lawrence Pountney Lane.*

Contra, Cr.

| 1799. | | | | £ s. d. | | | | 1799. | | | | £ s. d. | | | |
|---------|-----|--|--------------------|---------|----|----------|-----|--|-----------------------------|--------|------------------|---------|---|---|--|
| Nov. 28 | 49 | To expenses for bills of sale | 8 | 8 | 0 | Sept. 14 | 87 | By Lees & Co. received of him | 1,400 | 0 | 0 | | | | |
| " | 49 | To ship Volunteer for 8-16ths | 2,260 | 0 | 0 | Oct. 19 | 41 | By " " " " | 187 | 10 | 0 | | | | |
| | | 2,268 ^l . 8s. | 2,268 | 8 | 0 | Nov. 1 | 43 | By " " " " | 112 | 10 | 0 | | | | |
| 1800. | | | | | | Nov. 11 | 44 | By " " " " | 2,400 ^l . | 0 | 0 | | | | |
| Mar. 24 | 66 | To 2,400 ^l . per Volunteer | 881 | 0 | 0 | 1800. | | | | | | | | | |
| July 11 | 74 | To Lees, paid C. Wheeler, half pipe port wine | 89 | 11 | 9 | July 11 | 74 | By received of him for half pipe port wine | 89 | 11 | 9 | | | | |
| Dec. 31 | 102 | To wine account | 6 | 19 | 3 | Nov. 18 | 87 | By ditto | 500 | 0 | 0 | | | | |
| | | | 2,680 | 14 | 0 | Dec. 31 | 100 | By return Prem. 2,400 ^l . a' 11 ^l . 8s. 4d. per cent | 266 | 10 | 0 | | | | |
| Dec. 31 | 99 | To 2,500 ^l . per Volunteer, Wake, 2,893 ^l . 18s. 6d. | 218 | 2 | 6 | | | | 2,196 ^l . 1s 9d. | 2,196 | 1 | 9 | | | |
| | | | 2,898 | 16 | 6 | 1801. | | | | | | | | | |
| 1801. | 114 | To Lees & Co., paid T. Wake | 87 | 17 | 8 | Mar. 2 | 123 | By dividend 8-16ths Volunteer | 186 | 1 | 5 | | | | |
| Feb. 4 | 117 | To " " him | 500 | 0 | 0 | May 5 | 180 | By Lees & Co. received duties on stone | 11 | 2 | 2 | | | | |
| Apr. 28 | 129 | To " " " " 881 ^l . £255 10 | 124 | 19 | 4 | May 15 | 182 | By return Prem. 2,500 ^l . a' 3 ^l . per cent | 75 | 0 | 0 | | | | |
| | | To " duties on stone | 250 | 0 | | June 24 | 186 | By Lees & Co. received of him . £255 10s. | 500 | 0 | 0 | | | | |
| | | | £505 10 | | | Dec. 31 | 153 | By interest | 12 | 10 | 0 | | | | |
| May 15 | 138 | To 2,400 ^l . insured on Volunteer | 880 | 8 | 0 | | 155 | By return Prem. 2,400 ^l | 96 | 0 | 0 | | | | |
| | | | 124 ^l . | 8 | 76 | | | | 4,074 | 15 | 4 | | | | |
| 1802. | | | | | | 1802. | | | | | | | | | |
| Jan. 18 | 161 | To Lees & Co., paid him | 450 | 0 | 0 | May 1 | 186 | By ship Volunteer for dividend 8-16ths | 682 | 0 | 8 | | | | |
| | | | 4,826 | 8 | 8 | | | 212 ^l . 8s. | 650 ^l . | 4,796 | 16 | 2 | | | |
| Nov. 4 | 187 | To " Thompson, qr. pipe port | 24 | 18 | 10 | | | | | 4,879 | 16 | 2 | | | |
| Dec. 27 | 191 | To " Hullah, " Madeira | 28 | 14 | 1 | | | | | 2 | 5 ^l . | 387 | 0 | 0 | |
| | | | 4,879 | 16 | 2 | 1805. | | | | | | | | | |
| 1804. | 242 | To " paid Mr. Roberts | 500 | 0 | 0 | Jan. 29 | 262 | By sale account of ship Volunteer | 1,306 | 7 | 0 | | | | |
| Mar. 8 | 258 | To " paid Acta, &c. | 2 | 2 | 0 | | | £5,122 19s. 2d. | | £6,073 | 8 | 2 | | | |
| Mar. 14 | 268 | To " " Lewis | 41 | 1 | 0 | | | £4,796 | | | | | | | |
| Apr. 27 | 281 | To " " him | 200 | 0 | 0 | | | £266 | | | | | | | |
| | | | £5,122 | 19 | 2 | | | | | | | | | | |

ACCOUNT IN LEDGER B, FOLIO 42.

Dr.

DANIEL ALEXANDER.

Contra, Cr.

| | | £ | s. | d. | | | | | |
|---------|--|----|----|----|--|--|--|--|--|
| 1811 | | | | | | | | | |
| June 26 | 322 To Lees & Co. paid Stone for Lord Romney | 28 | 5 | 0 | | | | | |
| 1812 | | | | | | | | | |
| May | 38 To account of expenses for Arrowsmith's map | 5 | 5 | 0 | | | | | |

the respondent; and finding that there appeared to be a balance of 950*l.* 4*s.* due to the respondent from the intestate, by the accounts contained on folio 34 of the book marked A, witness examined the books marked respectively E, F, G, H, and I, for the purpose of ascertaining whether or no the intestate had made any other payments than what appeared on the said folio 34 to the respondent, and no such payments could there be found to have been made; and witness did not discover that the said balance of 950*l.* 4*s.* had been paid or satisfied. And witness had looked upon the folios 27, 66, 107, and 124 of the book marked A; and on said folio 27 there were entries of charges for insurance on the ship Volunteer, and of the cost of one sixteenth share of that ship; and on said folio 66 there were entries of sums charged for insurance, and of a credit for a dividend on the said ship; and on folio 107 there was an entry of a credit for another dividend on such ship; and on folio 124 there was an entry of credit for sale of the same ship; and it appeared by the said entries, that a sum of money was due to Charles Wheeler in * respect of the said ship, but not how * 725 much was so due; and that the accounts in the said folios related to a great number of other adventures and mercantile transactions besides that of the said ship Volunteer. The same witness stated that the intestate was engaged in the business of a merchant, ship-owner, and insurance broker, and was at the time of his death, and had been from the first establishment of the London Dock Company, secretary to that company; that he was for many years prior, and down to the time of his death, upon terms of intimate acquaintance and friendship with the respondent; and that it appeared by the produced books, marked respectively A and B, that they had dealings and accounts relating to the ship Volunteer, and cash matters, from the year 1799 to the year 1812; that the respondent was by profession an architect; that in the year 1820 he was, from ill-health, obliged to leave this country, and in consequence witness, as his brother-in-law, did undertake to arrange all his affairs; that some short time after the respondent so left this country, witness called several times upon the intestate with messages from the respondent,

and took the opportunity of asking the intestate to come to a settlement with the respondent respecting the ship Volunteer; and that the last time when witness saw the intestate respecting the account between him and the respondent relating to the said ship, was a few months before the death of the intestate; and witness did generally, on the said occasions, ask the intestate respecting a settlement of the said account, and the intestate generally evaded the subject, but never did state or intimate to witness, or in his presence, or to his knowledge, that he, the intestate, was not indebted to the respondent.

* 726 * Mr. Charles Wheeler, the third witness examined on behalf of the respondent, verified the account in the produced book marked A, between himself and the intestate, relative to the ship Volunteer; and he stated that the intestate was an insurance broker and underwriter, and from March, 1803, to March, 1804, was engaged, with witness and another, in the trade of coal-merchants; and he believed that he was, from October, 1805, to January, 1806, engaged with Jervase Jackson of London, in the business of policy brokers; and that the respondent had dealings and accounts with the intestate relating to the ship Volunteer, from the year 1799 down to the time of the sale of the said ship, in January, 1805, and also respecting the building of the London Dock, and the warehouses belonging to the same, from the year 1795 down to the time of the death of the intestate.

Two witnesses were examined for the appellant (one a clerk, the other a porter, in the service of the East India Company). The substance of their depositions was this: When the intestate first went to the London Dock-house, a back room on the ground floor was fitted up as an office for him, as secretary to the company, but he transacted business in that room four or five times only at the commencement of his residence in the house, after which, finding the room inconvenient, he discontinued the use of it; and from that time to the year 1814 that room was used only as a lumber room for depositing boxes and papers, and from 1814 it continued to be used as a lumber room, and also as a porter's or messenger's room for the servants of the company; and the

intestate never entered it for at least eight or nine years before his death. On the day of his death, the appellant and * the said John Robinson, and their solicitor * 727 Mr. Teesdale, met at the London Dock-house for the purpose of searching amongst the intestate's papers, to ascertain whether he had made a will. In the course of their search, books and papers relating to his affairs, and which referred to matters of modern date, were found in those parts of the house which he inhabited. Their attention being directed to a wardrobe in the said back room, they forced open the upper part thereof, and there found all the books and papers proved in this cause, covered with so much dust as to make it certain that none of them had been referred to or touched for many years.

The cause came on to be heard before the Vice-Chancellor on the 21st of July, 1830, when his Honor ordered and decreed that it be referred to the Master to take an account of all dealings and transactions between the respondent and the said intestate relating to the matters in the bill mentioned, &c.

The appeal was against that decree. (John Robinson died during the proceedings.)

Sir William Horne and *Mr. Wigram*, for the appellant. — There is no evidence that the respondent has any demand on the assets of the intestate. By the books of account, which came to the hands of the appellant in the manner stated by the witnesses, it appears that the respondent and intestate were jointly interested in the ship from September, 1799, to 1805, the respondent holding eight sixteenth shares and the intestate four sixteenths; and being also managing owner of the ship. It also appears, from the same books, that the ship made some freight, which was received by the intestate, and that he paid for her outfit and expenses, also for investments in goods * shipped on board of her on account * 728 of the owners; and that dividends were made on two occasions, in respect of the ship's earnings on her first and second voyages. Of these dividends two sums of 185*l.* 1*s.* 5*d.* and 692*l.* 0*s.* 8*d.* were entered to the credit of the respon-

dent in the account with him in ledger A, under the respective dates of 2d March, 1801, and 1st May, 1802. (a) In the same account various sums were entered to the debit of the respondent, as having been paid on his account by the intestate. The last items in it are: "1805, January 29. By sale account of ship Volunteer, 1306*l.* 7*s.*" on the credit side: "1805, April 27, 200*l.*" on the debit side. There is no later entry found in that or in any other book or paper belonging to the intestate, of any dealing or transaction between him and the respondent, except, indeed, that in another book of account, marked B, there are two entries, one of 28*l.* 5*s.* in June, 1811, the other of 5*l.* 5*s.* in May, 1812; (a) both on the debit side of an account with the respondent, and not relating in any manner to the ship Volunteer, nor to any matter in question in the cause. It is material to attend to the evidence of the state in which those books of account were found by the appellant, as from that it appears beyond a doubt that none of them could have been referred to or seen by the intestate for at least eight or nine years before his death.

The amount claimed by the respondent in respect of his share of the earnings and produce of the sale of the ship is 1134*l.* 18*s.* 8*d.*, which was calculated in this way: The bill alleged that, on the sale of the ship, the intestate paid 141*l.* 17*s.* 4*d.* in respect of her earnings and the produce of the sale, to Mr. Wheeler, who was owner of only one sixteenth share; from which the respondent concluded that he, *729 who * had eight sixteenths, should have eight times that sum. There is no evidence, in the account books or otherwise, of payment to Mr. Wheeler for any such sum, nor of any final settlement of accounts between him and the intestate. There is no evidence of acknowledgment by the intestate, or by the appellant or his late co-administrator, of any sum being due to the respondent in respect to the alleged dealings. On the contrary, the silence of the respondent for twenty years and more, in respect to the present demand, is equivalent to positive evidence against its validity. It is in evidence that during the whole of that time the respondent

(a) *Vide* the accounts, p. 728 *supra*.

and intestate were in constant communication in the most confidential manner, on their respective private concerns, and yet no mention was ever made by them of this alleged debt.

But supposing, in the absence of all proof, that the respondent's claim was originally well founded, still under the circumstances, and considering the lapse of time, as well as the uninterrupted intercourse between the respondent and intestate down to the time of his death, their Lordships were bound to presume payment or other satisfaction, and to hold the account as stated and closed many years ago. The account sought for by the respondent's bill was not a general account, but was confined to the ship's earnings and proceeds of sale,—to transactions which took place above twenty-one years before the bill was filed. The second account, that in ledger B, dated in 1811 and 1812, having no relation to the dealings in the ship, should not be considered a continuation of the ship's account, which ended in 1805. At all events, inasmuch as there was no item in any of the accounts within six years of the institution of the suit, and as the respondent was not under any disability to sue, the rule in equity, founded * on analogy with the Statute of Limita- * 730 tions (a) in courts of law, barred this suit. The account here sought was not within the exception in the third section of the statute; it was not a mutual account, nor was it "between merchant and merchant" (the words of the exception), but an account by one partner against another, and the last item in it being long anterior to six years before suit, the whole was barred. So little of the character of trade and merchandise had these dealings, that, until the 6 Geo. 4, cap. 16, the parties could not be made bankrupts.

On the two points, the lapse of time and the application of the exception in the statute, the following cases were cited: *Sherman v. Sherman*, (b) in which it was stated to have been held, that if dealings between merchants had ceased for several years, and one of them died, and the surviving merchant brought his bill for an account, the Court

(a) 21 Jac. 1st. c. 16.

(b) 2 Vern. 276.

would not decree an account, but would leave the plaintiff to his remedy at law; *Bridges v. Mitchell*, (a) where acquiescence for twenty years was held a bar to a suit for an account between merchants; *Barber v. Barber*, (b) where the bill was said, as in the present case, to be against the representative of a deceased partner, Sir WILLIAM GRANT held that the Statute of Limitations was a bar, all accounts having ceased above six years; *Cattling v. Skoulding*, (c) *Martin v. Heathcote*, (d) *Webber v. Tivill*, (e) *Walford v. Liddell*, (g) *Crawford v. Liddell*, cited in *Jones v. Pengree*, (h) and *Foster v. Hodgson*. (i)

* 731 * *Mr. Knight* and *Mr. Stuart*, for the respondent.

— It was established by the evidence that, at the time of the intestate's death, there was an open and unsettled account between him and the respondent in respect to their joint dealings in the ship, and that the intestate had never settled with the respondent the account which, in the confidential situation he held, of managing owner of the ship, he was bound to do. The depositions of Mr. England were quite conclusive, not only that there was an unsettled account and a large balance due to the respondent, but also that the intestate, up to the time of his death, acknowledged the account to be unsettled. That witness deposed, that "some time after the respondent left this country (having gone abroad for the benefit of his health) he (the witness) often called on the intestate with messages from the respondent, and took an opportunity of asking him to come to a settlement with the respondent respecting the ship *Volunteer*; and the last time when witness saw the intestate respecting that account, was a few months before his death, and the witness generally, on those occasions, asked him respecting the settlement of the said account, and the intestate generally evaded the subject, but never stated or intimated to witness that he

(a) Gilb. Eq. Rep. 224; S. C., Bunb. 217.

(b) 18 Ves. 286.

(c) 6 T. R. 189.

(d) 2 Eden, 169.

(e) 2 Wms. Saund. 126, n. 6 & 7.

(g) 2 Ves. 400.

(h) 6 Ves. 580-582.

(i) 19 Ves. 180.

was not indebted to the respondent." That deposition was sufficient to sustain the Vice-Chancellor's decree for taking the account. Upon the account in ledger A, the balance in favour of the respondent is 950*l.* 4*s.* If the appellant is to have credit for those sums, entered in that account as paid by the intestate, why is he not to be debited with the items entered on the other side? It is in evidence that the accounts are in the intestate's handwriting.

It has been argued on behalf of the appellant, that * as there is no entry in the account within six years * 732 before the commencement of the suit, the respondent's claim must be held as barred by the Statute of Limitations, or by a presumption of payment from the lapse of time and acquiescence of the respondent, and cases have been cited to support those positions; but the attempted defence on the statute is not only inapplicable to these transactions, but is also inconsistent with the admissions of the appellant and with the evidence. The cases cited do not apply to this account, which was, in point of law, an account between merchant and merchant, and strictly within the exception of the third section in the Statute of Limitations, the words of which are, "all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants." If the respondent had abandoned the account in 1805, and had acquiesced for twenty years, then indeed a presumption of satisfaction would arise, and no suit for his claim, at law or in equity, could be maintained. Presumption of satisfaction, however, might be rebutted by proof of part payment, or other transactions. The account here was an open and unsettled account in 1805, and there were subsequent transactions between the parties, of which the account in ledger B was evidence, making these accounts one running account. The case of *Barber v. Barber*, (a) cited for the appellant, was not authority; it was reported *ex relatione*, and the reporter did not give the name of the person on whose relation he had it; the statement of the case was very meagre; it was stated that they were partnership accounts, but it could not be

(a) 18 Ves. 286.

collected whether the accounts were between merchants respecting mercantile transactions, although the counsel

* 733 there argued * them as mercantile transactions, and the Master of the Rolls (Sir WILLIAM GRANT) held the claim to be excluded by the statute. That report is discredited on other grounds: in *Foster v. Hodgson*, (a) which came before Lord ELDON about a year afterwards, and was argued by Sir SAMUEL ROMILLY, who was counsel in *Barber v. Barber*, no reference was made to the latter. The law, as deduced from all the cases of authority, is, that where an account, even between merchants, has been stated and settled, and six years have elapsed without a new entry, that is conclusive, all claim is barred by the statute, and the courts of equity, on the ground of acquiescence and satisfaction, adopt a rule analogous with the limitation of the statute; but there is no bar where the account, though adjusted once, has been opened by subsequent entries, and made a running account. *Sandys v. Bladwell*, (b) *Holscorn v. Rivers*, (c) *Farrington v. Lee*, (d) *Webber v. Tivill*, (e) and the cases referred to in the notes to the report of the last case.

Sir William Horne replied. — The respondent produced no evidence to support his claim; the accounts are taken from the intestate's book, and an attempt has been made to confound two accounts, which are quite distinct, for the purpose of exempting this case from the operation of the statute. It was no impeachment of *Barber v. Barber* that it was not cited in *Foster v. Hodgson*; it may not have been there reported, and it is not to be expected that the counsel who argues a case will remember it, and cite it a year after in arguing another case.

* 734 * THE LORD CHANCELLOR. — My Lords, the course which I shall propose to your Lordships to adopt in order to form your decision in this case, is naturally suggested to me by the line of argument, and by the importance of the

(a) 19 Ves. 180.

(b) Sir Wm. Jones, 401.

(c) 1 Cas. in Chancery, 127.

(d) 2 Mod. 312.

(e) Saund. 126.

points which have been taken at the bar. On one of those points, namely, how far the circumstances of this case justified the Court below in presuming satisfaction or payment from lapse of time, I see no reason to entertain much doubt, or to form any opinion different from that to which the Vice-Chancellor came upon that part of the case. But as to the other point, which is the principal one raised, namely, the application of the Statute of Limitation, or rather the exception of merchants' accounts in the enacting or operative part of the third section of that statute, which has been elaborately argued at your Lordships' bar, I should wish to have further time for consideration. It is a matter which has been made so little the subject of solemn decision, and on which so many opposite *dicta* are found in the books, that, as at present advised, I should wish to have an opportunity of conferring with some of the learned Judges of the common-law Courts, before I finally make up my mind to advise your Lordships to affirm his Honor's decree. With that view I should propose to your Lordships to postpone the consideration of this case for a few days. Another reason for suggesting that course to your Lordships is, that I may take an opportunity of inquiring whether there has been any recent decision since I left the other side of Westminster hall, affixing another and a more definite meaning to that clause of the statute than it has hitherto had. If my present degree of doubt should continue on further consideration, I should then be disposed to advise your Lordships to hear the case *re- *735 argued before the learned Judges, by one counsel on each side, before finally deciding the case; — not at present saying that that will be the conclusion to which I shall come, but throwing it out merely for consideration.

Considerable doubts hang over the decision of the case of *Barber v. Barber*; (a) not over the authority of the learned Judge by whom it is represented to have been pronounced, but over the report itself; inasmuch as, in the first place, it is *ex relatione*, and secondly, there is but a very scanty account of the circumstances as well as of the argument; the point being made in the last paragraph of the report, as to

(a) 18 Ves. 286.

the exception of the statute applying to merchants' accounts: and then, as it appears in the report that his Honor Sir WM. GRANT disposed of it in very summary and somewhat general terms, I should wish to examine that case further. At present, therefore, holding that that case is not of the highest authority, and feeling great doubt of the accuracy of the report, especially when we find that in the subsequent case of *Foster v. Hodgson*, (a) neither Lord ELDON in his judgment, nor the counsel on either side in their arguments, press that authority, although in all probability it was published; and at all events, Sir SAMUEL ROMILLY, who argued the case of *Foster v. Hodgson* before the Lord Chancellor, is stated in the report to have been in the case at the Rolls, and he must have been aware of it: for these reasons and with these views, I shall beg your Lordships to postpone the further consideration of this case.

July 9.

* 736. * The Lord Chancellor, after stating shortly the main facts of the case, said, the question in it was a question of accounts involving two points: one, whether the lapse of time and other circumstances entitled the House to presume payment? The other was, whether the Statute of Limitations, which was set up as a defence, operated in the same direction, and (the respondent being within the exception in that statute) barred the suit? I stated at the close of the argument, that on the first of these points I had no doubt; I considered that, under the circumstances of this case, the lapse of time (and so thought the Court below) did not entitle the House to presume satisfaction or payment.

The second point was the one upon which, in regard to its importance, some difference of opinion had existed, particularly as to the reported decision in the case of *Barber v. Barber*; (b) a decision that has been a good deal questioned and commented on here, if not elsewhere. I considered that it was fit to allow this case to stand over for further consideration; and I mentioned, that should I continue to entertain a doubt on that point, the importance of the question,

(a) 19 Ves. 180.

(b) 18 Ves. 286.

and the frequency of its recurrence in courts of law, more than in equity, would incline me to obtain the opinion of the Judges, and to have the case reargued before them for that purpose. I have since had conversation with some of those learned persons; I have reconsidered the case, and the result is that the inclination of my opinion, as it was at the time of the argument, has been confirmed. I therefore advise your Lordships now to affirm the judgment of the Court below, without costs. It was a matter very fit for * consideration. The conflicting arguments are fully * 737 stated, and the doctrine deduced from them is laid down with great distinctness by *Mr. Serjeant Williams*, in one or more notes to the case of *Webber v. Tivill.* (a) Both these notes give a very distinct statement of the cases on the subject; and regard being had to those cases, and to the opinion of Lord KENYON, which is distinctly given in one of them, I am of opinion that his Honor the Vice-Chancellor came to a sound conclusion on the second, as he had done upon the first point raised in the case; and that the suit being within the exception of the statute, it is not barred by the Statute of Limitations. I am confident that if an action at law had been directed to be tried, and sent to a court of law on this point, there would have been, under the circumstances, no doubt of a verdict and judgment for the plaintiff. I therefore recommend your Lordships to affirm this judgment, but without costs.

Judgment affirmed without costs.

(a) 2 Saund. 127, n. 6 & 7.

[603]

FROM THE COURT OF CHANCERY.

LEWIS *v.* BRIDGMAN.

1834.

| | | |
|---|---|---------------------|
| THOMAS LEWIS, Esq., and ROBERT ANDREW | } | <i>Appellants.</i> |
| STEVENS | | |
| WILLIAM BRIDGMAN, the Younger, and JOHN | } | <i>Respondents.</i> |
| LEWIS MALLETT, Executors of Sir SAMUEL | | |
| YOUNG, Bart. | | |

Tithes. Improprate Rectory. Portioner.

A portioner entitled to tithe of hay, is not necessarily entitled to tithe of clover, tares, vetches, and grass, cut and carried away green.

May 5, 10.

In June, 1824, the appellants filed their bill in Chancery against Sir Samuel Young, Bart., since deceased, and thereby stated that the appellant T. Lewis was in May, 1815, and ever since continued to be, seised of the tithes of corn, grain, hay, and grass yearly arising within a certain district or portion of land within the parish of Cookham (Berks), called the lower division of the parish of Cookham, and bounded as therein particularly mentioned; That by an indenture, dated 3d of May, 1815, he demised unto the appellant Stevens all the aforesaid tithes to which he (Lewis) was so entitled as aforesaid, with others, by the description of all that parcel of tithes of corn, grain, hay, and other tithes whatsoever, appertaining or in anywise belonging to the parsonage of Cannon, in Cookham (Berks), coming, increasing, renewing, or growing upon all the lands, arable, meadow, and pasture ground

* 738 whatsoever, lying * within the parish of Cookham, and within the limits, precincts, and boundaries therein mentioned; To hold the same and certain other hereditaments thereby demised, for the term and at the rent therein

mentioned: And that by virtue of the said indenture, the appellant Stevens became entitled to the tithes of corn and grain, hay and grass, yearly arising, &c., on all the land situate within that part of the said parish of Cookham; That the said Sir S. Young had, in the years 1820, 1821, 1822, 1823, and 1824, occupied and then continued to occupy a certain farm (containing 168 acres) situate within the said parish of Cookham, great part whereof (viz., 134 acres) was comprised within the precincts and bounds in the said indenture mentioned; and had in each of the said years cut and carried away from his farm, situate within the boundaries aforesaid, large quantities of clover, tares, or vetches, meadow and rye grass, and other grasses, without making the same into hay; and that he had carried off part thereof whilst in the swathe, and other part whilst in heaps, without setting out the tithe thereof to the appellant Stevens, or making to him compensation for the same; and the appellants submitted that the tithe of all such clover, tares, or vetches, and grasses, so cut and taken away, ought to have been set out to the appellant Stevens, as such lessee as aforesaid, or that a full compensation for the same ought to have been paid to him. And they, the appellants, frequently requested Sir S. Young to account for the value of the several tithable matters and things so subtracted by him; but he refused to comply with such requests, alleging that the appellant T. Lewis was, at the time of making the said indenture of demise, only entitled to the tithe * of hay within the said district, * 740 and that in his title-deeds tithe of grass was not conveyed to him by name, whereas the appellants charged that by law the person who was entitled to the tithe of hay was entitled to the tithe of all clover, tares, or vetches, and grasses of every description, severed from the ground by the hand of man, from the moment the same was so severed; and they prayed that the said Sir S. Young might be compelled to come to a fair and just account with the appellant Stevens, for the single value of the tithes of all the clover, vetches or tares and grasses, which he in manner aforesaid, in the years aforesaid, had taken from off his said farm, and be decreed to pay what should appear due on such account.

Sir Samuel Young put in a plea in bar to the bill, and to the relief and discovery thereby sought, to this effect: That the appellants were not, nor was either of them, seised or possessed of or entitled to any tithes whatsoever, within the parish of Cookham, or the tithable places thereof, except only such tithes as appertained or belonged to the parsonage of Cannon, in the said bill mentioned; and that the parsonage of Cannon was an impropriate rectory to which the tithes of clover, tares, vetches, meadow and rye grass, and other grasses, cut and taken and carried away without being made into hay, did not, nor did any of such tithes, appertain or belong; and therefore that the appellants were not, nor was either of them, entitled to any such account or payment as by their bill was prayed, or to any discovery or relief in respect of the tithes of such clover, tares, vetches, and grasses, or any of them.

Issue was taken upon this plea, and witnesses were
 * 741 * examined on both sides. (a) Before the matter was heard Sir S. Young died, and the suit abated. It was revived in 1828 against the respondents, who were his executors; and the cause having come on to be heard before the Vice-Chancellor in January, 1830, the bill was ordered to be dismissed with costs. (See the report of the case, 3 Sim. 316.)

The appeal was from that order.

Mr. Knight and *Mr. Spence*, for the appellants.—By the effect of the plea of Sir S. Young, it was admitted that the appellant Lewis was entitled to the parsonage of Cannon, and that the parsonage of Cannon was an impropriate rectory; the *primâ facie* title of the appellant Stevens, the lessee of Lewis, to the tithes demanded by the bill, was therefore admitted, and it was incumbent on Sir S. Young to have proved by evidence that these tithes did not belong to the impropriator, that being the issue of fact tendered by the plea. The question came to this, whether the tithes here

(a) The material parts of their evidence were read by the counsel, and may be seen in the subjoined notes of their arguments.

demanded were great tithes belonging to the rector, or small tithes belonging to the vicar.

Sir S. Young entered into evidence with a view to prove that the vicar was entitled to the tithes in question, but the evidence not only failed to establish that fact, but served to prove the perception of these very tithes by the appellants. The only witnesses examined to the point were, the vicar of the parish (who was materially interested in the event of the suit), and Mr. Allnutt, who had occupied a farm within the parsonage of Cannon. The vicar did not state a single instance of the tithes in question having been set out * in * 742 kind, or of any payment having been made to him in respect of them, but merely stated that he had received a composition for all the small tithes; but from a letter admitted to have been written by him in 1822, it was evident that such composition did not include any tithes of the nature demanded by the appellants, and that the vicar did not at that time consider himself entitled to such tithes. Mr. Allnutt proved that in the only instances in which the tithes in question had been rendered in kind, they had been collected by the appellant Stevens, as lessee of the appellant Lewis, as impropiator of the parsonage of Cannon, and that he had never set out the tithes in question, or paid any composition in lieu thereof to the vicar; and it appeared, on his cross-examination, that in 1822 he had himself voluntarily set out the tithes in question on his own farm, in kind, to the appellant Stevens, and had admitted the appellants' right to such tithes in 1824.

The documentary evidence proved by Sir S. Young consisted of a certified copy of a document from the registry of the Bishop of Salisbury. The appellants procured an inspection of the copy of that document, and they also caused the original to be inspected; and it appeared from the inspections that this document was not signed by any person; and although it was represented at the hearing, and was considered by the Vice-Chancellor, in giving judgment, to be a terrier, dated in 1715, and signed by the then churchwardens, it was not in fact so dated or signed, nor did it bear any date or signature, nor was it in any manner authenticated as a terrier. This document ought not to have been received in

evidence. There was at least sufficient doubt on the
 * 743 evidence to entitle the * appellants to an issue, which the Vice-Chancellor refused to grant. (a)

But even if the respondents had made out that the vicar was entitled to all the small tithes, still the appellants would in law have been entitled to a decree for an account of the tithes demanded by their bill, particularly of the tithes of tares or vetches; for they are great tithes, and belong of right, not to the vicar, but to the impropiator, and it made no difference whether they were dried or taken away when green; *Hodgson v. Smith*, (b) *Steers v. Brazier*, (c) *Lagden v. Flack*, (d) *Knight v. Halsey*, (e) *Sims v. Bennett*, (g) *Lewis v. Allnutt*. (h) This last case was a suit by these appellants against the witness Allnutt, for tithes of the same nature with those demanded in the present suit, and under precisely the same circumstances. The appellants obtained a decree in the Exchequer Chamber, and that decree was affirmed on appeal to this House.

Sir Edward Sugden and *Mr. Kindersley*, for the respondents. — The question in this case was disposed of in *Lewis v. Young*, (i) a suit instituted in the Court of Exchequer by these appellants against Sir Samuel Young for these same tithes. The decree being adverse to them, they appeal to this House, but never brought that appeal to a hearing.

* 744 The object of the present * suit, instituted in the Court of Chancery, was to try to get a different decision from another Judge. The argument for the appellants assumes that the plea admitted their title to the tithes demanded by them, because it admitted their title “to the tithes belonging to the parsonage of Cannon, and that that parsonage was an inappropriate rectory.” The admission is not in the sense in

(a) The import of the document referred to, and the substance of the depositions of the vicar and of Mr. Allnutt, are set forth in 3 Sim. 319–321.

(b) Bunb. 279; S. C., 2 Gwill. 743.

(c) 2 Gwill. 742; S. C., 2 Eag. & Y. 61.

(d) 2 Hagg. Consist. 303.

(e) 4 Gwill. 1554.

(g) 1 Eden, 382.

(h) 2 Bligh N. S. 83.

(i) 13 Price, 394; S. C., 1 M’Cle. 118.

which the appellants took it to be. Their bill alleged title to certain tithes within the lower division of the parish of Cookham. The plea denied their title to any tithes within the parish of Cookham, except such as appertained to the parsonage of Cannon; and the respondents insist that the tithes claimed never appertained to that parsonage or rectory, and so put in issue the title alleged in the bill.

Whether the vicar of Cookham is or is not the owner of these tithes, is not the question in the cause; the respondents are not bound to show who is the owner, but the appellants are bound to prove their title, for it is distinctly questioned. In the case of *Norbury v. Meade*, (a) Lord ELDON held that a plaintiff in equity must state his title in his bill, and if not admitted he must prove it. "A lay impropiator," said his Lordship, "must claim under his deeds; or if he shows uniform exclusive possession, that may raise a presumption, in the absence of deeds." (b) The appellants ought to have stated and given evidence of the foundation of their title, or of the perception of tithes of tares, grass, &c., cut green. The evidence shows that the vicar is entitled to these tithes, and that they are small tithes has been often decided in law.

The issue tendered by the plea, independently of the question of general title, though apparently an *issue *745 of fact, is in effect an issue at law (viz.), whether the right to the tithe of hay carries with it the right to the tithe of clover, tares, vetches, and grasses, cut and carried without being made into hay? And it has been decided, that by law the right to the former does not carry with it the right to the latter. The appellant is wrong in point of law, and does not even attempt to prove the fact upon which the point of law arises. The respondents, on the contrary, prove, by the depositions of the vicar, "that the parsonage of Cannon formed only a part of the parish of Cookham; that, to the best of his knowledge, all the great tithes arising within that district belonged to the parsonage of Cannon, but no species of small tithe belonged thereto; that the parish of Cookham was a vicarage without any endowment, and that the vicar was entitled to all the small tithes arising within the whole

(a) 3 Bligh, 211.

(b) 3 Bligh, 225.

parish, and from the lands comprised in the district called the parsonage of Cannon, as forming part of the parish of Cookham; that during the whole of his (the vicar's) incumbency, he received a money payment as a composition in satisfaction of all the small tithes arising from all the lands in the parish, including the district called the parsonage of Cannon; that the appellant (Lewis) was entitled to the great tithes within the parsonage of Cannon, and the vicar to all the small tithes within the whole parish of Cookham, including the said parsonage, and, among other species of small tithes, to the tithe of grass, tares, &c., cut and carried away green; and he never knew a claim made for these as being a species of great tithe, until such claim was made by the appellants." The appellants, therefore, have failed not only in proving their title, but also on the question of fact of perception of the tithes.

With respect to the question of law, whether the
 * 746 * tithes claimed were great or small tithes, it will be sufficient to refer to the elaborate judgment of Lord Chief Baron ALEXANDER, in *Lewis v. Young*, (a) in which he reviewed and distinguished all the cases on that subject. That case, and the case of *Dorman v. Sears*, (b) which was to the same effect, are not to be overruled by *Lagden v. Flack*, (c) which is a case of no authority. On the two grounds, first, that the appellants have not made out their title, and secondly, that the tithes claimed by them are small tithes, it is submitted that the appeal should be dismissed with costs.

Mr. Knight, in reply.—The case of *Lewis v. Young* was appealed from, but the appeal was not prosecuted in consequence of the death of Sir S. Young. Sir WM. SCOTT, in deciding the case of *Lagden v. Flack*, had all the cases cited to him, and he held that the tithes of tares and clover, cut with an instrument and carried away green, were great tithes; and the same was held in the Court of Exchequer, and in this House, in *Lewis v. Allnutt*.

(a) 13 Price, 394.

(b) 6 Price, 338.

(c) 2 Hagg. Consist. 303.

[*Sir Edward Sugden*. — That was upon Allnutt's admissions.]

Grass cut and carried away green, and grass dried and harvested, are the same; *Sims v. Bennett*. (a) Lord NORTHINGTON in the last case said that the mode of harvesting made no difference in the quality of the tithe; if great tithe when dried, it was great tithe when green. The only question which raised any difficulty against the appellants was the proof of title, and that was partly admitted by the plea. There is also evidence of the perception of these tithes by the appellants; for * the witness Allnutt admitted * 747 that himself and some of the occupiers of land in the district, had set out these tithes or paid a composition for them to the appellants between 1815 and 1822, when the adverse decision was made in *Lewis v. Young*. It is to be hoped that this house will not adopt the principle of that decision.

THE LORD CHANCELLOR. — I shall ask your Lordships' permission to allow this case to stand over, until I shall have looked into the cases that were cited at the bar. Although the appeal to this House in *Lewis v. Young*, was not prosecuted, yet it might be; it is as easy and as usual to revive an appeal here after abatement, as a suit in the Court of Chancery. The principle of that case, however, is now appealed from in this case: you may on the same grounds go back for eight or ten years, and appeal from all the doctrines established by the Courts during that time. Are your Lordships prepared to do that, and bring under your consideration all the tithe cases decided in the Court of Exchequer? The law is made up of decided cases. With respect to the case of *Lagden v. Flack*, no man can feel greater veneration than I do for the learned Judge, Lord STOWELL, who decided that case. It may, however, be observed, that if there was any branch of jurisdiction in which one might have less respect for his authority than in another, it was the adjudication of tithe cases, in which that learned Judge had less experience,

(a) 1 Eden, 382; S. C., 2 Gwill. 874.

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less solertia, in consequence of the infrequency of such cases in the ecclesiastical Courts. It accounts for his want of knowledge on the subject, his consciousness of his want of knowledge, that he did not give his judgment in that case without consulting another Judge (Chief Baron RICH-
 * 748 ARDS) from * whom he said he learned that very nice distinction, that grass severed with an instrument is great, but by the mouth of an animal is small tithe. (a) If it had been a case of salvage or of prize, he would not have had so much diffidence in himself as to consult another; and we are not bound *in consulto* to give the same weight to his decision on a question of tithes, as we should be if it were one on which that very learned Judge brought the powers of his own well-stored mind to bear.

Without professing to entertain any great doubt on the present case, I should recommend to your Lordships to postpone the consideration of it for a few days, until I refer to the cases.

Moved and postponed accordingly.

July 9.

The Lord Chancellor mentioned the case this day; and, after referring shortly to the facts and question in dispute, recommended to their Lordships to affirm the decree of the Court below.

Affirmed accordingly, with 198*l.* costs.

(a) 2 Hagg. Consist. 309.

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ACTION. See MONEY HAD AND RECEIVED.

The King granted by letters-patent to the mayor and burgesses of Lyme Regis, the borough so called, and also the pierquay or cob, with all liberties and profits, &c., belonging to the same, and remitted part of their ancient rent payable to the King; and he willed that the mayor and burgesses, and their successors, all and singular the buildings, banks, sea shore, &c., within the said borough, or thereto belonging, or situate between the same and the sea, and also the said pier, &c., at their own costs and charges thenceforth for ever should repair, maintain, and support. *Held* by the Lords, affirming the judgment of the Courts of C. B. and K. B., that the mayor and burgesses, having accepted the letters-patent or charter, became legally bound to repair the buildings, banks, and sea-shore; and that this obligation being one which concerned the public, an indictment would lie against them in case of non-repair, and an action on the case for a direct and particular damage sustained by any individual. — *The Mayor of Lyme Regis v. Henley*, 331.

ACCOUNT (BILL FOR).

In 1799, D. A. purchased shares in a ship of G. R., who retained other shares in the same, and was entrusted by D. A. and the owners with the whole management of the ship and with the keeping of the accounts. The ship was sold by G. R. in 1805, with the consent of the owners, and he received the proceeds of the sale and settled accounts with W., one of the owners, to whose credit a balance appeared to be placed in respect of the earnings of the ship and the proceeds of the sale. In 1826, D. A. filed a bill against the administrators of G. R., who died in 1824, for an account of D. A.'s share of the earnings and proceeds of the sale of the ship. In G. R.'s account-books, which appeared not to have been referred to for several years, were two accounts with D. A., one relating to the ship in the way of debit and credit from 1799 to 1805, the other containing two items *only, in 1811 *750 and 1812, on the debit side, and not appearing to relate to the ship. D. A. was absent from England from 1820, after which time E. his brother-in-law, a witness in the cause, "called frequently on G. R. with messages from D. A., and asked him to

come to a settlement of accounts with D. A. in respect to the ship. G. R. evaded the subject, but never stated or intimated that he was not indebted to D. A." Held by the Lords, affirming a decree of the Court below, that D. A. was entitled to an account of the dealings between him and G. R. relating to the ship. — *Robinson v. Alexander*, 717.

AGREEMENT. See ATTORNEY, 1.

APPROPRIATION OF MONEYS. See PAYMENT.

ATTORNEY.

1. An agreement of partnership was made between two solicitors, one of whom could only practise in a superior, the other only in an inferior Court. Both undertook to divide the profits of their general business, and each stipulated to recommend the other to his clients, and to keep the partnership a secret from all the world. Held, that such an agreement is void, for a Court cannot suffer statements to be made and papers presented to it by parties who are neither parties to the cause, nor their lawfully authorized agents, and who are consequently not properly responsible to the Court for their conduct. — *Gilfillan v. Henderson*, 1.

2. On a contract for the sale of part of an estate, the purchaser requiring a fine to be levied of it for the purpose of removing admitted defects in the title, the vendor employed an attorney, who was his relation, and had been professionally employed by him on previous occasions, to levy the fine and complete the contract. The attorney advised the levying of a fine of the whole of the vendor's estate, without telling him the effect of it; such fine was accordingly levied, and the vendor died without declaring its uses, and without republishing his will, previously made, by which he had devised the whole estate to his wife, who survived him. After the vendor's death the attorney claimed the estate as his heir-at-law, alleging that the will was revoked by the fine, and he brought actions of ejectment to recover possession thereof. The widow filed a bill in Chancery for relief; and on an issue directed by that Court, a jury found that the attorney fraudulently omitted to tell the vendor * what effect the fine would have upon a devise of the property comprised in it. The Court of Chancery, upon that verdict, decreed the attorney to be a trustee for the devisee of the lands and hereditaments which so descended to him as heir-at-law. The House of Lords, affirming that decree, further held, that the attorney's alleged ignorance of the effect of a fine on a will of the lands comprised in it, and his omission to inquire whether the conusor, his client, had made a will, were such professional ignorance and neglect as afforded a principle by which a Court of Equity might, independent of the ground of fraud, hold him to be a trustee for a third person, of any benefit resulting to himself from his professional ignorance or neglect, to the prejudice of that person. — *Bulkley v. Wilford*, 102.

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3. It is the duty of an attorney employed to levy a fine to ask his client whether he has made his will. — *Ibid.* 179.
4. An attorney shall not be heard to plead ignorance of the effect of a fine on a will ; he is bound to have the knowledge and to give the information to his client, and shall not have any benefit from his ignorance. The principles of equity that are applied to trustees are also applicable to persons entrusted with the management of property in legal proceedings respecting it, even without fraud. — *Ibid.* 181.
5. It is a principle of equity that no professional man shall take advantage of his own ignorance or negligence. — *Ibid.* 183.

ATTORNEY-GENERAL. See PRECEDENCE.

BILL OF EXCHANGE.

A letter from the holders of a bill of exchange to an indorser liable upon the bill, threatening legal proceedings if the bill is not paid, is no notice to such indorser of the dishonour of the bill. — *Solarte v. Palmer*, 98.

CHARITY ESTATE. See TRUST.

CHATTELS. See WILL.

CONSTRUCTION,

OF COVENANT. See COVENANT.

OF GRANT. See EVIDENCE.

OF WILL. See WILL.

COVENANT.

1. It is a rule of the Courts, in construing written instruments, that when an estate is given or an estate conveyed in one clause of the instrument in clear and decisive terms, such interest or estate cannot be taken away or cut down by raising a *doubt upon the extent and meaning and application of *752 a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate. — *Thornton v. Hall*, 22.
2. A lease made in 1663 of land in Ireland, together with all mines thereon in the disposal of the lessor, and all timber growing thereon, to be disposed of by the lessee, he planting trees in the room of them, to hold the premises, without impeachment of waste, to him, his executors, administrators, and assigns, for ninety-eight years, at a rent therein mentioned, — contained a covenant that the lessor, his heirs and assigns, should, upon request of the lessee, his executors, administrators, and assigns, from "time to time renew the said lease, and perfect such other assurances as the lessee, his executors, administrators, and assigns, should reasonably require for strengthening, confirming, and suremaking the demised premises, at such rents, and under such covenants and conditions, as in the said lease were con-

tained." Another covenant provided that, in case of eviction, or waste by rebellion, the rent should cease and be abated. A renewal of the lease, with all the covenants, was executed in 1739. *Held* by the Lords, affirming the judgment of the Court of Exchequer in Ireland, that the covenant was not for perpetual renewal, but for confirming and further assuring the original lease. — *Brown v. Tighe*, 396.

DESCENT. See LEGITIMACY.

DIVORCE. See HUSBAND AND WIFE, 1.

EVIDENCE. See TRUST, 2.

The manner in which a donor of a fund, who was the first trustee under the grant by which a school was provided for, conducted himself in the distribution of the fund, is very strong evidence of intention, and may be so treated by the Court in construing the grant itself. — *Attorney-General v. Brazen Nose College*, 295.

EXECUTOR AND ADMINISTRATOR. See LEGACY DUTY. PROBATE DUTY.

FOREIGN JUDGMENT.

The creditors of a person resident in Ireland filed a bill in the English Court of Chancery, and obtained a decree for an account, &c., and afterwards (the property of the debtor lying chiefly in Ireland) filed a bill in the Court of Chancery there, praying to have the full benefit of the proceedings in the *English suit. The Court of Chancery in Ireland dismissed such second bill as for want of jurisdiction. *Held*, that the judgment of the Court of Chancery in Ireland was erroneous, that the proceedings in the English Court of Chancery were in the nature of a foreign judgment, and were to be treated as such in Ireland, namely, as *prima facie* evidence of right in the party who had obtained the judgment. *Held*, also, that this House could either remit the case with directions, or appoint a receiver, and take such other proceedings as the Court of Chancery in Ireland might have done. — *Houlditch v. Donagall (Marquess)*, 470.

FORGERY. See MONEY HAD AND RECEIVED.

FRAUD. See AGREEMENT. ATTORNEY.

HUSBAND AND WIFE.

1. A Scotchman domiciled in Scotland was married in England to an Englishwoman, and by marriage contract secured to her a jointure on his Scotch estates. They went to Scotland after their marriage, and resided there a short time, when they returned to England. They afterwards agreed to a separation, and articles of agreement were executed, by which the husband secured a separate maintenance to the wife during the separation. From

the time of the separation the wife resided abroad, and the husband continued to be domiciled in Scotland, where he raised an action of divorce against her, on the head of adultery, alleged to have been committed abroad after the separation. *Held*, by the House of Lords, affirming the interlocutor of the Court of Session, that the wife's legal domicile was in Scotland, where the husband's was, and that she was amenable to the jurisdiction of the Scotch Court; that an edictal citation, with actual intimation by serving a copy of the summons personally, was a good citation; and that it is competent to the Scotch Courts to entertain a suit to dissolve a marriage contracted in England. — *Warrender v. Warrender*, 488. See also *Dexia v. —*, and *Lolly's Case*.

2. The Duchess of Norfolk was entitled, under the trusts of the settlement made in contemplation of her marriage with the duke in 1771, to two annuities of 700*l.* and 300*l.*, charged by way of pin-money upon estates to which the duke was entitled for his life. The duke received all the rents and profits of the estates, and maintained the duchess according to her rank, up to the time of his death in 1815. * In 1816 the duchess was * 754 found to have been a lunatic, without lucid intervals, from 1782, and she continued so until 1820, when she died intestate. Her personal representative claimed from the personal representative of the duke, arrears of the pin-money from 1782 to 1815. *Held* by the Lords, reversing the decree of the Court below, that the personal representative of the duchess was not entitled to any arrears of pin-money. — *Howard v. Digby (Earl)*, 634.

INDICTMENT.

1. An indictment was removed from an inferior Court into the Court of King's Bench in Dublin, after plea pleaded and issue joined thereon; the issue thus joined is not such "an issue joined in the Court of King's Bench" as will satisfy the words of the Statute 17 & 18 Car. 2, c. 20, and cannot therefore be tried under the authority of that statute at the Nisi Prius sittings of that Court. — *Rowe v. The Attorney-General*, 43.
2. The King granted by letters-patent to the mayor and burgesses of Lyme Regis, the borough so called, and also the pierquay or cob, with all liberties and profits, &c., belonging to the same, and remitted part of their ancient rent payable to the King; and he willed that the mayor and burgesses, and their successors, all and singular the buildings, banks, sea-shore, &c., within the said borough, or thereto belonging, or situate between the same and the sea, and also the said pier, &c., at their own costs and charges thenceforth for ever should repair, maintain, and support. *Held* by the Lords, affirming the judgment of the Courts of C. B. and K. B., that the mayor and burgesses, having accepted the letters-patent or charter, became legally bound to repair the buildings, banks, and sea-shore; and that this obligation being

one which concerned the public, an indictment would lie against them in case of non-repair, as well as an action on the case for a direct and particular damage sustained by any individual. — *The Mayor, &c. of Lyme Regis v. Henley*, 331.

INFERIOR COURT. See INDICTMENT.

ISSUE. See INDICTMENT.

JUDGES.

The Judges will decline answering a question put by the House of
 * 755 Lords, if that question is not confined to the * strict legal construction of existing laws. — *In the Matter of the London and Westminster Bank*, 191.

JURISDICTION. See FOREIGN JUDGMENT. HUSBAND AND WIFE.

LEGACY.

A testator, living in Jamaica, gave, by his will, legacies of 1000*l.* and 1000*l.* to A., and of 500*l.* each to B. and C., who also resided there, and directed that they should be paid out of the money due to him upon bonds given by the said A. The testator afterwards went to Scotland, where he died in 1790. The legatees left Jamaica in the same year. Probate of the will was granted there in 1791, and the bonds due from A. were put in suit by the executor. In 1818 the legacies given to B. and C. were purchased by A., their near relative, for 25*l.* each. In 1821, administration, with the will of the testator annexed, was, for the first time, taken out in this country, and in that year A. filed his bill, claiming payment of these legacies. *Held*, that a Court of Equity might, after such a lapse of time, consider all the circumstances of the case, and presume the legacies to be satisfied. — *Campbell v. Sandford*, 429.

LEGACY DUTY. See also PROBATE DUTY.

A testator born in Scotland, but having for many years resided in India, died there, leaving real and personal property situated in India, but no assets in England. By his will and testamentary papers, all executed in India, he left the whole of his property, in equal divisions, to his four natural children or the survivors of them and their heirs, subject to some small legacies and annuities. His executors, who were in India before and at the time of his death, having obtained an Indian probate, paid the debts and bequests, and got in the testator's estate and converted the principal part thereof into money, which they sent to their bankers in England, and afterwards invested it in the funds in their own names. A suit was afterwards instituted in the Court of Chancery in England, to ascertain the claims of the residuary legatees under the will; whereupon the stock was transferred into the name of the Accountant-General of the Court of Chancery, and that Court made a decree declaring the shares of the several claimants. In that suit a claim was made on behalf of

the Crown, for the legacy duty on the residuary fund.

* *Held* by the House of Lords, affirming the judgments of * 756 the Courts below, that legacy duty was not payable on the legacies, annuities, or shares of the residue bequeathed. — *Attorney-General v. Forbes*, 48.

LEGITIMACY.

Qu., Whether a child born in Scotland, of parents who at the time of his birth are not married, but who afterwards marry each other (neither having in the mean time married any other person), can take as heir lands of his father in England. — *Doe d. Birtwhistle v. Vardill*, 571.

LIMITATIONS (STATUTE OF). See LEGACY.

LORD ADVOCATE. See PRECEDENCE.

LUNATIC.

If a wife becomes lunatic, and during her lunacy the husband supports her in a style befitting her rank, he shall be presumed to have satisfied the purposes for which pin-money was settled on the wife, and shall not after her death be liable to any demand in respect of arrears of pin-money alleged to have been left unpaid during her life. — *Howard v. Digby (Earl)*, 634.

MARRIAGE. See HUSBAND AND WIFE. LEGITIMACY.

MONEY HAD AND RECEIVED.

F., a partner in a bank, caused stock belonging to a customer to be sold out by a forged power of attorney: the proceeds were paid to the account of the bank, at the house of the bank's agents, and were appropriated by F., who was afterwards executed for other forgeries. The partners of F. were ignorant of the fraud, but might, with common diligence, have known it. *Held*, that the customer could maintain an action against the partners for money had and received. — *Marsh v. Keating*, 250.

NEGLIGENCE. See ATTORNEY.

PAYMENT.

Moneys paid by debtors, without specifically appropriating them, are to be applied in discharge of their oldest debts. — *Toulmin v. Copland*, 681.

PARTNERS.

1. Two solicitors in partnership had a bill of costs and disbursements against a client; one of the partners, after the dissolution of the partnership, continued to be the solicitor of the client, and received his rents, out of which he retained * the * 757 amount of the partnership debt; and he stated that he did so on the understanding that the debtor should have credit for the sum so retained, and that he considered that debt to have been satisfied by the moneys retained; but no account had been settled between him and the debtor, nor had he specific directions to appropriate the moneys retained to the payment of the

partnership debt. *Held*, that as against the other partner, the debt to the partnership was not to be considered as satisfied. — *Nottridge v. Prichard*, 379.

2. R. T. and A. T. having carried on business in partnership in equal moieties, the former retired, leaving large sums due to the partnership from its customers, and some debts also owing from the partnership. A. T. entered immediately into partnership in the same business with C., and it was agreed between them, but not in writing, that upon A. T.'s bringing into the new partnership 40,000*l.* of good debts owing from customers of the then late partnership, for the purpose of meeting claims of debts from that partnership, transferred to the accounts of the new partnership, A. T. should be entitled to two-thirds of the new partnership, and C. to one-third. This partnership business was carried on for fourteen years without any settlement of accounts, or any entry in the books declaring the terms of the partnership. It appeared that within the first five or six years, 40,000*l.* were received from the debtors of the former partnership, but not so much, if the advances to them by the new firm were deducted from their payments. *Held*, that 40,000*l.* of good debts were brought in according to the intent and spirit of the agreement. — *Toulmin v. Copland*, 681.

PIN-MONEY. See HUSBAND AND WIFE.
PLEADING.

To a bill filed by persons claiming title to an estate as co-heirs of A. T. *ex parte materna*, and charging an agreement and a correspondence in which they alleged their title was admitted, the defendants pleaded to the whole bill, that there was in existence an heir of A. T. *ex parte, paterna*. *Held*, that the plea was properly overruled by the Courts below, on the ground that it ought to be accompanied by an answer to the correspondence and some of the other charges in the bill. — *Harland v. Emerson*, 10.

PORTIONER. See TITHES.

*758 *POWER.

By indenture of settlement, a fund was assigned to trustees upon trust for all and every the child and children of a marriage, in such shares, at such age or ages, and subject to such conditions and limitations, as the wife, in case she survived the husband, should appoint. There was one child only of the marriage, and the wife surviving the husband, appointed the fund to that child for her separate use for life, and after her decease to such persons as the child should appoint, and in default of appointment, to the child's executors or administrators. The child by her will appointed to the fund, and died. *Held*, that the power in the settlement was well exercised by the wife, and that the child's appointment carried the fund to her appointee. — *Bray v. Bree*, 453.

PRACTICE.

1. The House will not receive from the agent of a plaintiff in error a petition to refer a case to the Judges, to consider the points of

law which in his petition such plaintiff states to be involved in the case; but if counsel do not appear to argue for him, will proceed, on the motion of the counsel for the defendant in error, to affirm the judgment of the Court below. — *Ricketts v. Lewis*, 100.

2. The Judges will decline answering a question put by the House of Lords, if that question is not confined to the strict legal construction of existing laws. — *In the Matter of the London and Westminster Bank*, 191.
3. A bill was filed by certain plaintiffs in the Court of Chancery in England, and a decree for an account obtained. The same plaintiffs (the property of the debtor lying chiefly in Ireland) filed a bill in the Court of Chancery there, praying to have the full benefit of the proceedings in the English suit. The Court of Chancery in Ireland dismissed such second bill, as for want of jurisdiction. *Held*, that this House could either remit the case with directions, or appoint a receiver, and take such other proceedings as the Court of Chancery in Ireland might have done. — *Houlditch v. Donegall (Marquess)*, 470.
4. If there be an accidental omission of form in the drawing up of a decree in the Vice-Chancellor's Court, and that decree be appealed against, the Lord Chancellor may supply the omission. — *Newdigate v. Newdigate*, 601.

* PRECEDENCE.

* 759

The Attorney-General of England has precedency over the Lord Advocate of Scotland, in all matters in which they may appear as counsel at the bar of this House. — *The Attorney-General and Lord Advocate's Case*, 481. See also the notes at pp. 483 and 487.

PROBATE DUTY. See also LEGACY DUTY.

Where a testator dies in this country possessed of personal property here and also in foreign funds, and the executor takes out probate here and pays probate duty on the amount of the property in this country, he is not chargeable with the probate duty in respect of the property in the foreign funds, although he afterwards obtain such property and administer it. — *Attorney-General v. Hope*, 84.

RENEWALS. See COVENANT. TRUST.

STATUTE. See INDICTMENT.

TITHES.

A portioner entitled to tithe of hay, is not necessarily entitled to tithe of clover, tares, vetches, and grass, cut and carried away green. — *Lewis v. Bridgman*, 738.

TRUST.

1. Where a fund is given to the members of a corporate body as trustees for the maintenance of a school, if such fund is not given

out and out, but only as the trustees may think best to apply it for the advantage of the school, the surplus, after satisfying the exact charge first created upon the fund, belongs to the trustees.

The manner in which the donor of the fund, who was the first trustee under the grant, by which the school was provided for, conducted himself in the distribution of the fund, is very strong evidence of intention, and may be so treated by the Court in construing the grant itself. — *Attorney-General v. Brazen Nose College*, 295.

2. If the trustees of a charity estate make a lease upon terms, which, at the time of making it, appear to them *bond fide* to be the best that can be got, a subsequent alteration of circumstances shall not affect such lease.

In such a case the question of provident or improvident management is entitled to peculiar consideration. The length of time during which the property has been occupied under the lease, is also to be taken into consideration. — *Attorney-General v. Hungerford*, 357.

* 760 * WASTE.

Where A. was tenant for life without impeachment of waste, except as to "the timber growing in the park, avenues, demesne lands and woods adjoining to the capital messuage," and cut timber in woods not precisely answering that description, but which were an ornament or shelter to the messuage. *Held*, that he was guilty of equitable waste, and an account was directed and an injunction granted. — *Newdigate v. Newdigate*, 601.

WILL.

1. A testator recites *seriatim* in his will the interests he had in several leaseholds for lives, and after each recital he devises the rents and profits of each leasehold to his wife and a married daughter, and to each of his sons and unmarried daughters, severally and respectively, devising to his son R. part of the profit rent of Blackacre during the term of the lease, which was for the lives of the testator and of R. and another, and devising to his unmarried daughters *nominatim* different parts of the rents of Whiteacre, in addition to equal shares given to them by the preceding clause in the rents of another estate; "and further, if any of the above legatees should die, or die unmarried, he left the property bequeathed to them to be divided equally among the survivors of them." *Held*, that the devise to R. in Blackacre was for the whole term of the lives of the *cestuis que vies*, and was not, on R.'s dying unmarried, cut down to an estate for his life only, by the clause of survivorship, but that the words of the clause applied to the last-mentioned unmarried daughters only. — *Thornhill v. Hall*, 22.

2. J. L. devised his manors and hereditaments to trustees upon trust to convey the same to the use of J. H. L. (his eldest son) for

life; with remainder to trustees to preserve contingent remainders; with remainder to the use of the second, third, fourth, fifth, and all and every other the son and sons of the body of J. H. L., severally and successively in seniority of age and priority of birth, in tail male; remainder to the use of devisor's second and other sons successively in tail male; remainder to the use of J. H. L.'s first, second, third, fourth, fifth, and all and every other daughter and daughters successively, in tail general; remainder to the use of devisor's eldest daughter, M. S. L., for life; remainder to * trustees to preserve, &c.; remain- * 761 der to the use of the first, second, third, fourth, fifth, and all and every other son of M. S. L. successively, in tail male; remainder to her first, second, and other daughters successively, in tail general; with divers other like remainders to the devisor's other daughters and their issue, and various intermediate terms in trust.

There was no express limitation to J. H. L.'s first son, nor any provision for him made or referred to in the will; but the trust of the first term directed to be contained in the settlement to be made by the trustees was declared to be, in case there should be no son of J. H. L., for raising portions for his daughters, except an eldest or only daughter; and the trusts of the other terms were to be for raising portions for the younger children of the successive tenants for life, in case there should be no issue of the body of J. H. L.; and a power was directed by the devisor to be inserted in the settlement to enable J. H. L. to charge the devised estates with portions for his children other than an eldest or only son. *Held*, that the first son of J. H. L. was entitled to have an estate tail in the devised manors and hereditaments, expectant on the death of his father, limited to him in the conveyance directed to be made by the trustees. — *Langston v. Langston*, 194.

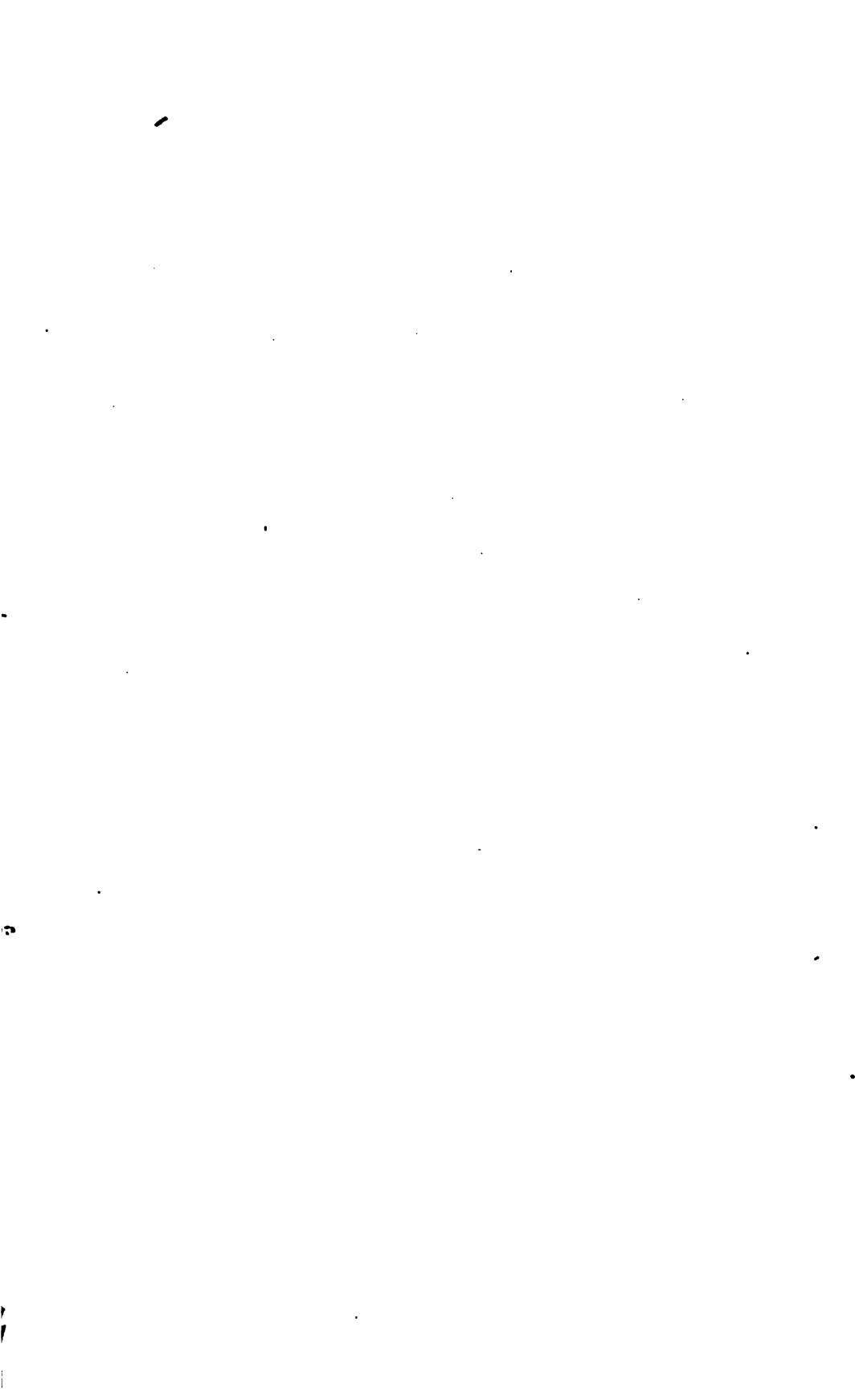
3. A testator bequeathed 20,000*l.* to C. H., his natural daughter; but in case of her death without lawful issue, he willed the money so left to be equally divided betwixt his nephews and nieces, "who may be living at the time." He also left to C. A. H., his niece, 3000*l.*; but in case of her death, without issue, to revert back, and be divided betwixt his nephews and nieces, who might then be living. The residue of his property he directed to be divided into fifteen shares, to be for his other fifteen nephews and nieces, after the deaths of their parents respectively. C. H. and all the nephews and nieces survived the testator, and C. H. died some time after, under age and unmarried, having made a will bequeathing the 20,000*l.* *Held*, that C. H. took an absolute interest in the 20,000*l.*, and that the limitation over was void for remoteness. — *Candy v. Campbell*, 421.

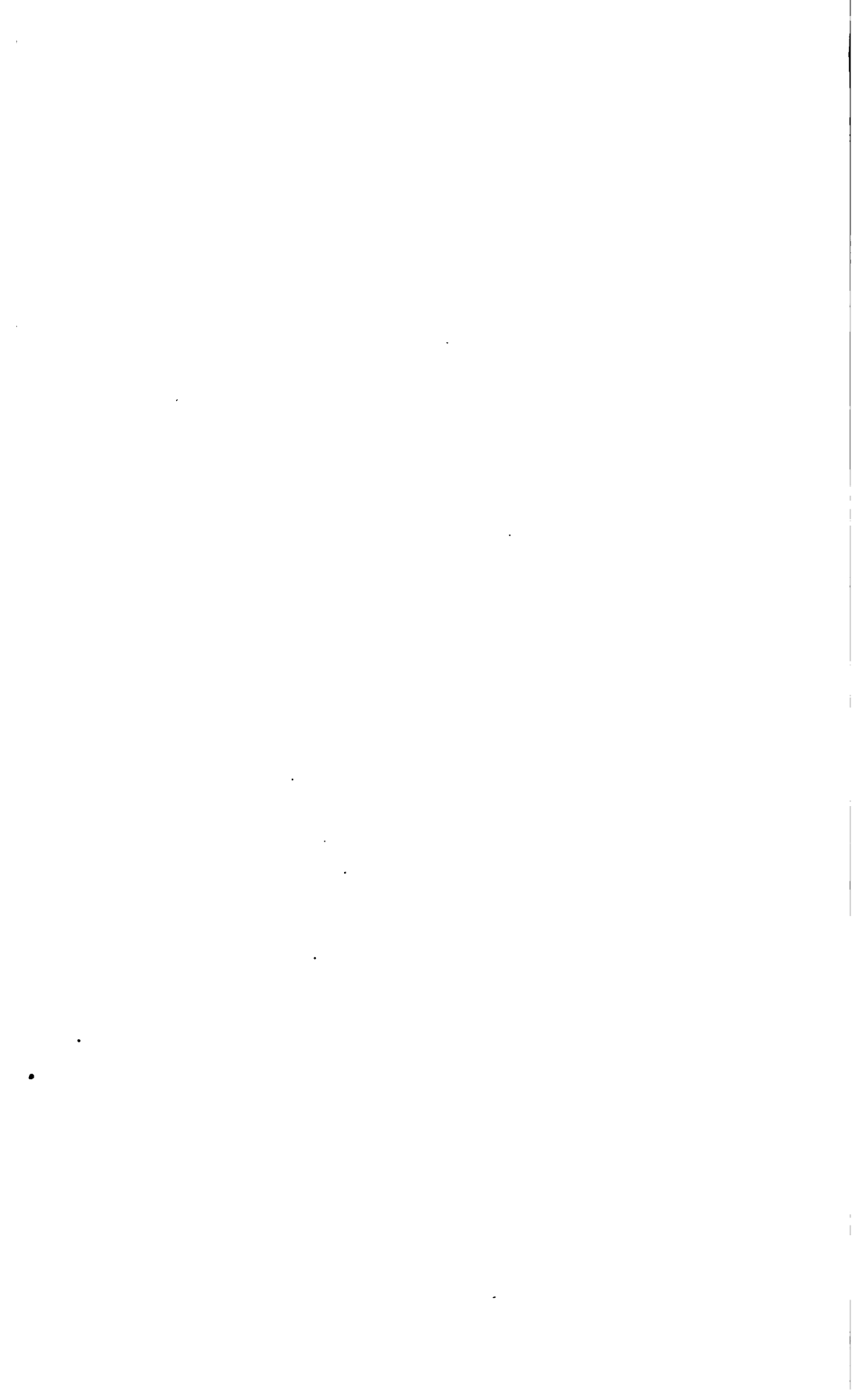
4. A. was, under a will, tenant for life without impeachment of waste, except as to "the timber growing in the park, avenues, de-

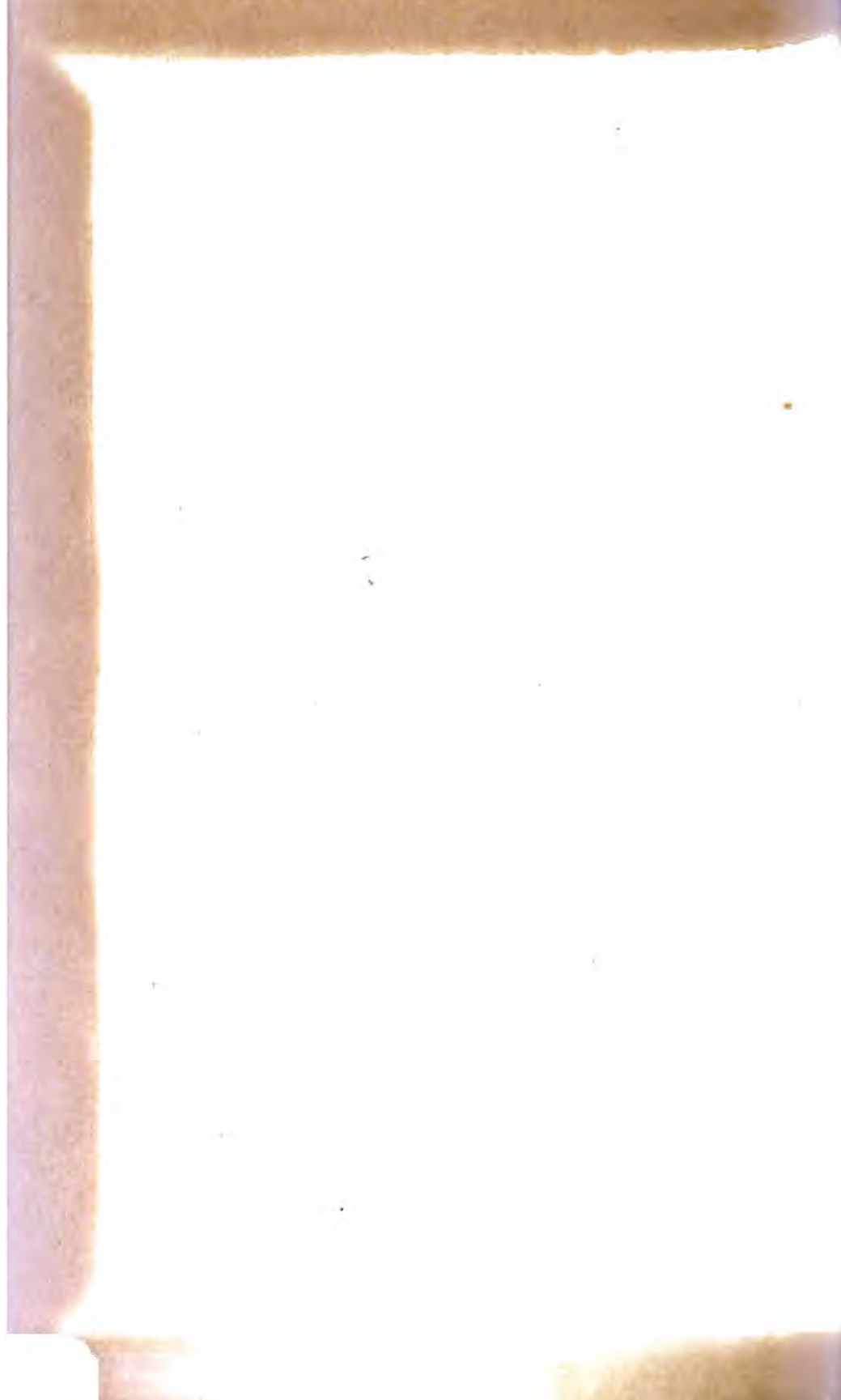
- * 762 mesne lands, and woods adjoining to the capital * messuage," and cut timber in woods not precisely answering that description, but which were an ornament or shelter to the messuage. *Held*, that he was guilty of equitable waste, and an account was directed, and an injunction granted. — *Newdigate v. Newdigate*, 601.
5. Vere, Lord Vere, bequeathed certain chattels to trustees, in trust for his wife for life, and after her decease for his son for life, and after the decease of the survivor of them, in trust for such person as should from time to time be Lord Vere; it being his will and intention that the same should, after the decease of his wife, go and be held with the title of the family, as far as the rules of law and equity would permit. The testator left his wife and son surviving him, and also two sons of his son. After the death of the wife and son, the eldest grandson succeeded to the title and to the enjoyment of the chattels, and died, leaving an only son, who then succeeded to the title, and died an infant and unmarried, leaving the second grandson of the testator surviving him. *Held*, by the Lords, reversing a decree of the Court below, that the chattels vested absolutely in the eldest grandson, on succeeding to the title. — *Tollemache (Lady) v. Coventry (Earl and Countess)*, 611.

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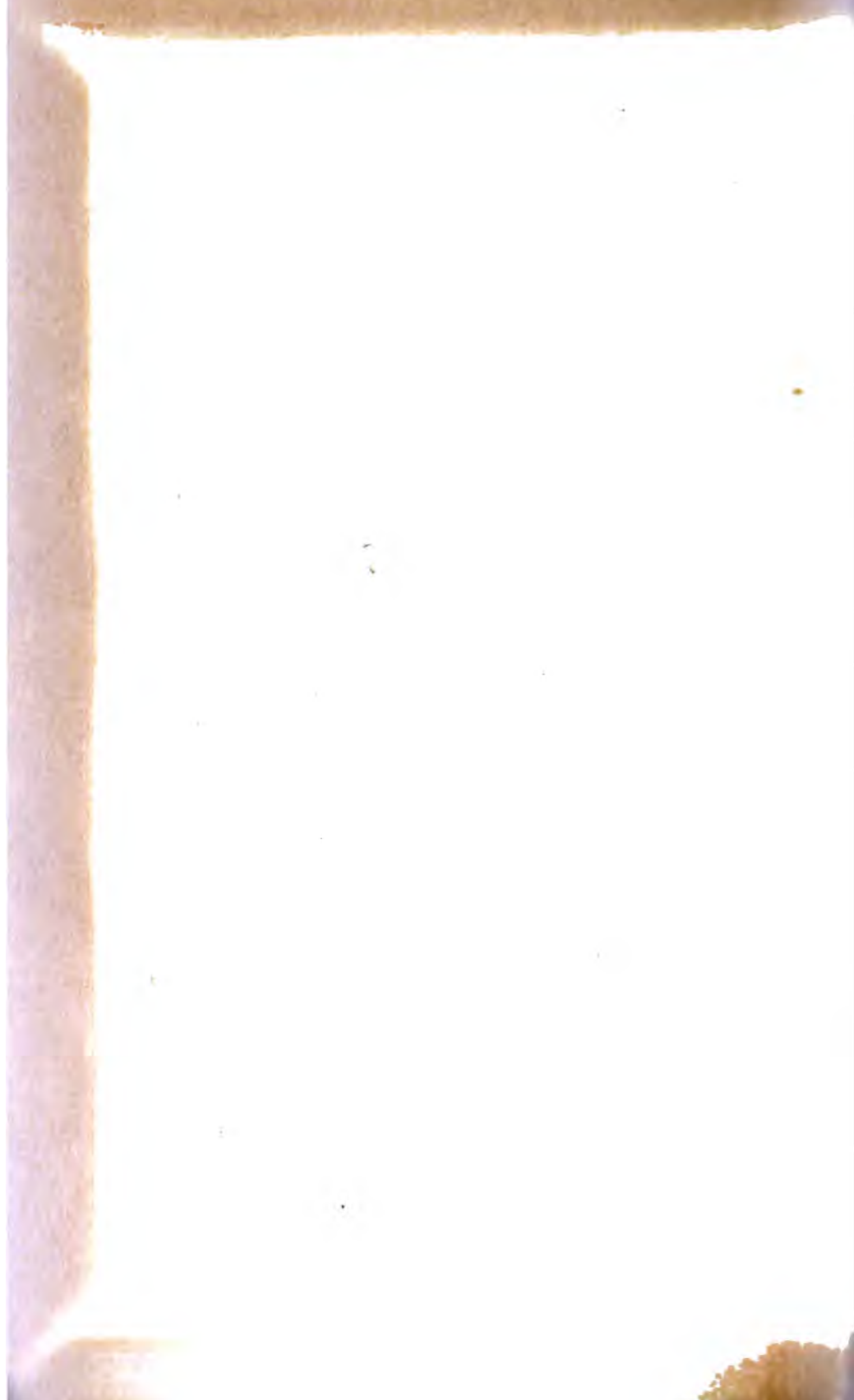




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